SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 38

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND LAIRD BELL, EXECUTORS OF THE ESTATE OF WILLIAM H. REDINGTON, DECEASED, PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INDEX

	Page
Proceedings before United States Board of Tax Appeals	1
Docket entries	1
Petition	2
Exhibit A—Commissioner's letter	10
Answer	12
Stipulation of facts	13
Findings of fact and opinion, Trammell, M.	15
Decision	19
Petition for review	20
Notice of filing petition for review	22
Præcipe for transcript	23
Agreement to præcipe	24
Certificate of clerk	24
Proceedings in United States circuit court of appeals, seventh circuit.	25
Clerk's certificate	25
Appearances of counsel	27
Order that cause be heard with cause No. 4699	29
Order setting cause for hearing	29
Minute entry of argument and submission	30
Opinion, Alschuler, J.	31
Judgment	38
Note re filing of petition for rehearing	38
Order denying rehearing	39
Clerk's certificate	41
Order allowing certiorari	43

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 22, 1933

1 Harold T. Griswold, W. W. S. Carpenter & Laird Bell, Executors of the Estate of Wm. H. Redington, Deceased.
Petitioner,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 21942.

Appearances:

For Taxpayer: Laird Bell, Esq., Darrell S. Boyd, Esq., Thos. L. Marshall, Esq., Stiles W. Burr, Esq.

For Comm'r: R. F. Staubley, Esq., Frank T. Horner, Esq.

DOCKET ENTRIES.

1926.

Dec. 16—Petition received and filed. Taxpayer notified.
Dec. 17—Copy of petition served on General Counsel.

1927.

Feb. 15—Answer filed by General Counsel.
Mar. 18—Copy of answer served on taxpayer. General Calendar.

1930.

Dec. 1—Hearing set February 3, 1931.

1931.

Jan. 28—Stipulation as to facts filed.
February 3—Hearing had before Mr. Trammell, Div. 2. Called on merits—petitioner's brief filed and served—petitioner given 15 days to reply to Commissioner and Commissioner given 60 days to reply to original brief.
Feb. 5—Transcript of hearing of Feb. 3, 1931, filed.
Apr. 1—Brief filed by General Counsel.
May 5—Reply brief filed by taxpayer. May 7, 1931 copy served.

Jun. 9—Findings of fact and opinion rendered, Mr. Trammell, Div. 2. Judgment will be entered determining a deficiency of $5,236.55.

Jun. 11—Decision entered, Logan Morris. Div. 14.

Nov. 4—Supersedeas bond for $10,573.10 approved and ordered filed.

Nov. 17—Petition for review by U. S. Circuit Court of Appeals (7) with assignments of error filed by taxpayer.

Nov. 17—Proof of service filed.

Dec. 2—Agreed praecipe filed.

Dec. 7—Petition for review to U. S. Circuit Court of Appeals (7) with assignments of error, filed by General Counsel.

Dec. 16—Proof of service filed by General Counsel. (2)

UNITED STATES BOARD OF TAX APPEALS.

Harold T. Griswold, W. W. S. Carpenter and Laird Bell, Executors of the Estate of William H. Redington, Deceased,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent.
} Docket No. 21942.

PETITION.

Filed Dec. 16, 1926.

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (MT:ET:C1-4659-OJV) dated October 20, 1926, and as a basis of their proceeding allege as follows:

1. The petitioners are the duly approved and qualified Executors of the Estate of William H. Redington, deceased, who died October 8, 1923, and resided at No. 1232 Ridge Avenue, Evanston, Illinois. The address of the petitioners is 846 West Congress Street, Chicago, Illinois.

3 2. The notice of deficiency (copy of which is attached and marked Exhibit A) was mailed to the petitioners on October 20, 1926.

3. The taxes in controversy are additional estate taxes assessed against the Estate of William H. Redington, deceased, who died October 8, 1923, in the amount of $11,273.06.

4. The determination of the tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner wrongly included in the gross estate of decedent $90,000 assessed with respect to real estate held by the decedent during his lifetime and by Frances A. Redington, his wife, as joint tenants, with right of survivorship, under deed dated and delivered on October 5, 1909.

(b) The residue of the estate subject to life estates was given by the will of decedent entirely to charities exempt from tax. In computing the value of the residue bequeathed to charity, the Commissioner wrongly deducted inheritance taxes paid to the States of Illinois, Wisconsin, New York, Maine and Kansas.

(c) The Commissioner wrongly decreased his figures of the value of a bequest to charity, of the remainder of the residuary estate after the life estates of the widow and daughter, by reason of the widow's limited right to invade the principal of said fund.

4 (d) In computing the value of the bequest of the residue to charities, the Commissioner wrongly computed the value of the remainder so bequeathed upon tables applicable to the value of a "reversion" and not to the value of a remainder after deducting life estates computed in accordance with tables established by the Commissioner.

5. The facts upon which the petitioners rely as the basis of this proceeding are as follows:

(a) On October 5, 1909, William H. Redington, being the owner of property situated in Evanston, Illinois, used by him as a homestead, deeded the same through an intermediary to himself and Frances A. Redington, as joint tenants and not as tenants in common, and title to said property vested upon delivery of said deed in said grantees as such joint tenants, with right of survivorship under the laws of Illinois. Frances A. Redington made no contribution to the cost thereof, but said deed was delivered and title vested on or about the date of said deed by the force of the original grant.

(b) The portions of the will of decedent material to computation of the bequests to charity are as follows:

"Article V.

I give, devise and bequeath unto Central Trust Company of Illinois, a corporation organized and existing under the laws of the State of Illinois, as Trustee, and to its successors in trust hereunder, all the rest, residue and remainder of my estate, of whatsoever kind and nature and wheresoever situated, belonging to me or to which I may be entitled at the time of my death, including any lapsed legacies (all of which is sometimes hereinafter referred to as my Residuary Trust Estate), upon the following trusts, that is to say:

Section 1. To divide said Residuary Trust Estate into two funds, one of which, to be known as Fund A, shall comprise two-thirds in value thereof, and the other of which, to be known as Fund B, shall comprise one-third in value thereof.

Section 2. To hold, manage and dispose of said Fund A for the following purposes and in the following manner, that is to say:

(a) To pay the net income of said Fund to my wife, Frances A. Redington, for and during her life, in equal monthly installments, and if such net income shall be less than Twenty Thousand Dollars ($20,000) in any one year to pay to her out of the principal of said Fund, if she shall request it, a sufficient sum to bring the payments to her in each year up to the sum of Twenty Thousand Dollars ($20,000).

(b) Upon the death of my wife, or upon my death if I should survive my wife, to pay to my daughter Ruth Redington Griswold, if living, the net income of said Fund A, in equal monthly installments ~~for and during~~ her life.

(c) Upon the death of the survivor of my said wife and daughter, or upon my death, leaving neither my said wife nor my said daughter me surviving, to set apart out of said Fund A two separate funds, each of the fair value in the judgment of said Trustee of One Hundred Thousand Dollars ($100,000), and to pay over, transfer and deliver one of said funds to Illinois Children's Home and Aid Society, a corporation of the State of Illinois, and the other of said funds to Chicago Commons Association, a corporation of the State of Illinois, both of said funds to be held by the respective corporations as

aforesaid, as endowments, the income of which shall be forever used for the support and maintenance of their respective institutions. I request that said bequest to said Illinois Children's Home and Aid Society be forever known and carried on the books and records of said Society as the Frances A. Redington Foundation. I request also that said bequest to said Chicago Commons Association shall forever carry the name of my sister Florence Redington Hayes on the books and records of said Association and be forever known as the Florence Redington Hayes Foundation.

After setting apart the two funds aforesaid, of the aggregate value of Two Hundred Thousand Dollars ($200,000), said Trustee shall pay over, transfer and deliver all the residue and remainder of said Fund A to The Young Women's Christian Association of Chicago, an Illinois corporation, to be by it forever kept separate and intact and to be forever known and carried on the books and records of said Association as the Frances A. Redington Foundation; provided, however, that if such residue and remainder of Fund A shall be sufficient, and the Board of Directors of said Association shall deem best, the said Association may, anything herein contained to the contrary notwithstanding, use the principal of
7 said bequest for or towards the purchase or erection of a building in the City of Chicago, to be used for carrying on the work of said Association, and in the event that the principal of said bequest shall be so used I request that any building so erected or purchased shall bear my wife's name.

Section 3. To hold, manage and dispose of said Fund B for the following purposes and in the following manner, that is to say:

(a) To pay the net income of said fund to my daughter, Ruth Redington Griswold, in equal monthly installments for and during her life.

(b) Upon the death of my said daughter after my death leaving heirs of the body her surviving, or upon my death if she shall have died in my lifetime leaving heirs of the body me surviving, to pay, deliver and convey the principal of said Fund B to such heirs of the body, share and share alike, division and distribution, however, to be made per stirpes and not per capita.

(c) Upon the death of my said daughter after my

death leaving no heirs of the body her surviving but leaving my wife Frances A. Redington her surviving, or upon my death if my said daughter shall have died in my lifetime leaving no heirs of the body me surviving but leaving my said wife me surviving, to pay the net income of said Fund B to my said wife in equal monthly installments, for and during her life.

(d) Upon the death of the survivor of my said wife and daughter leaving no heirs of the body of my said daughter surviving both of them, or upon my death leaving neither my said wife nor my said daughter nor any heirs of the body of my said daughter me surviving, to pay over, deliver and convey one-half in value of said Fund B to The Children's Memorial Hospital, a corporation of the State of Illinois, and one-half in value of said Fund B to Chicago Lying-In Hospital and Dispensary, a corporation of the State of Illinois, to be by them respectively held as endowments, the income thereof to be forever used for the support and maintenance of their respective institutions; provided, however, that if the fund given by this section to said Chicago Lying-In Hospital and Dispensary shall be sufficient, and if the Board of Directors of said corporation shall deem best, the principal of said bequest may, anything herein contained to the contrary notwithstanding, be used by said Chicago Lying-In Hospital and Dispensary for or towards the purchase or erection of a building in the City of Chicago to be used for carrying on the work of said corporation.

I request that said bequest to The Children's Memorial Hospital be forever known and carried on the books and records of said Hospital as the Ruth Redington Griswold Foundation."

"Article I.

I direct my Executors to pay all my just debts and funeral expenses and to pay out of the principal of my estate any and all valid taxes imposed by the United States Government or by the government of any State that may be assessed against my estate, or the interest of any beneficiary therein, and all such taxes, whether known as inheritance taxes, succession taxes or by any other name, shall be treated as expenses of administration chargeable against my estate generally, to be paid before my property is distributed."

The effect upon the computation of the residue of the Commissioner's deduction of inheritance taxes paid to the various states is as follows (no question being made by petitioners about the valuations of the assets in question):

	As found by Commissioner	As contended by Petitioners
Gross estate	$1,687,536.96	$1,687,536.96
Less charges and other deductions except state inheritance taxes paid out of estate	927,390.76	927,390.76
	760,146.20	760,146.20
State inheritance taxes paid out of residue	70,723.95	
Residue	689,422.25	760,146.20
Two-thirds of residue	459,674.83	506,764.13
Value of remainder (using the factor for two lives apparently used by the Commissioner, to-wit: .35202)	161,814.73	178,391.11 161,814.73
Amount which should be added to bequests to charity		16,576.38

10 (c) Under paragraph (a) of Section 2 of Article V of the will of decedent above quoted, if the payments from Fund A in any year shall be less than $20,000, the widow is entitled to receive a sufficient sum out of the principal to bring the payments to her up to $20,000. The present investments held in Fund A produce more than $20,000 a year; but even if they did not, the bequest of the remainder to the charities is a vested remainder under the laws of Illinois subject only to be divested upon the happening of contingencies in the future. At the date of death, therefore, the charities had a fully vested remainder. The Commissioner nevertheless decreased the value of the remainder on account of this contingency. The factor used by the Commissioner in computing the value of the remainder after joint lives where there was a limited right to invade the principal appears to have been .35202. The factor used for a remainder to the survivor of the same two life estates under the

trust created by Article IV of the will where there was no limited right to invade the principal was .36484. This difference, .01282, must represent the amount deducted by the Commissioner on account of the limited right of the widow to invade the principal; which factor as applied to the residue as found by the Commissioner improperly decreases the amount of charitable bequests by $2,074.46; and as applied to the amount of the residue as contended for by the petitioners decreases the gift to charity by $2,286.97.

11 (d) The Commissioner apparently allowed as deductions for charity, not the value of the fund after subtracting life estates computed according to his published tables, but a smaller amount based upon the values of "reversions" computed under said tables. In all cases but one under the will of decedent the remainder going to charity is subject to two life estates and, as no tables for the valuation of two life estates are published by the Commissioner it is not possible to state the exact effect of the Commissioner's use of "reversion" values as to said remainders. In the case of the fund created by Article II, Section 2, of the will of decedent, there is a remainder to charity after the life estate of Emma K. Hiatt, who was born February 24, 1881, and was more than 42½ years old at the date of the death of decedent. The value of her life estate in $25,000 according to the tables contained in Article 15 of Regulations 63 was $14,621.22, and the value of the remainder going to charity was therefore $10,378.78. The Commissioner, computing the value of the remainder under the portion of said tables providing for the value of a reversion, allowed only $10,217.75 for the gift to charity. Presumably the same course was followed in the computation in all the gifts to charity. If the Commissioner did compute all said gifts to charity on the basis of reversions, instead of on the basis of the gross bequest after deducting the life estate, and if the same factor of errors runs through them all, the charitable bequests would be in-

12 creased by about $6,000 from the amount assessed by him and the total tax upon the estate decreased accordingly.

6. The petitioners prav for relief from the deficiency asserted by the respondent in the following and each of the following particulars:

(a) That the total net estate be decreased by $90,000, the value of the property jointly owned by decedent and his wife;

(b) That the value of the gifts to charity be redetermined

in accordance with the contentions of the petitioners under items 4-(b), 4-(c) and 4-(d) above stated.

Wherefore the petitioners pray that this Board may hear and redetermine the deficiency herein alleged.

HAROLD T. GRISWOLD,
W. W. S. CARPENTER,
LAIRD BELL,
Executors of the Estate of William H. Redington, deceased.

LAIRD BELL,
DARRELL S. BOYD,
THOMAS L. MARSHALL,
Counsel for Petitioners,
134 South La Salle Street,
Chicago, Illinois.

13 State of Illinois } ss.
County of Cook }

HAROLD T. GRISWOLD, WILLIAM W. S. CARPENTER and LAIRD BELL, being duly sworn, each for himself says:

That he is one of the petitioners above named, that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true.

HAROLD T. GRISWOLD,
WILLIAM W. S. CARPENTER,
LAIRD BELL.

Subscribed and sworn to before me this 14th day of December, 1926.

FREDERICK C. E. LUNDGREN,
Notary Public.

(Notarial Seal)

14 EXHIBIT A.

MT-ET-C1-4659-OJV
District of 1st Illinois
Estate of William H. Redington
Date of death October 8, 1923
Deficiency Tax $11,273.06

Harold T. Griswold et al., Executors,
Estate of William H. Redington,
846 West Congress Street,
Chicago, Illinois.

Sirs:

The Bureau has examined the protest, filed by you as executors of the above named estate, against the tentative findings as set forth in letter directed to you under date of October 30, 1925.

In view of the evidence now of record and the protest arising in connection with the following items, adjustments are made as herein indicated:

Stocks and Bonds	Returned	Tentatively Determined	Determined
Item 1,	$10,050.00	$10,500.00	$10,500.00
Item 2,	4,500.00	4,750.00	4,500.00
Item 11,	4,500.00	4,750.00	4,500.00
Item 27,	9,661.00	10,000.00	9,661.00
Item 38,	20,203.50	20,720.00	20,195.00
Item 40,	19,368.00	20,200.00	19,368.00
Item 42,	20,500.00	20,783.20	20,500.00
Item 47,	6,400.00	6,850.00	6,400.00
Item 51,	8,820.00	9,540.00	8,820.00

15 Your protest in respect to jointly owned property is rejected for the reason that the wife contributed no part of the funds to make the original purchase.

Your protest in respect to deductions on account of charitable bequests is rejected for the reason that the amount allowed in the tentative audit was computed in accordance with the law and regulations.

In view of the foregoing, the gross estate is reduced from $1,691,636.16 as tentatively determined, to $1,687,536.96; the deductions remain as tentatively determined at $509,675.98,

and the net estate is reduced from $1,181,960.18 as tentatively determined to $1,177,860.98, the tax upon the transfer Feb. 15. which is $69,286.10. The return on Form 706 shows a tax of $58,013.04. The deficiency is, therefore, $11,273.06.

The records of this office show that the tax shown by the return was paid October 8, 1924.

Pursuant to Section 318 of the Revenue Act of 1926, notice of deficiency, amounting to $11,273.06, in estate tax with respect to the estate of William H. Redington, is hereby given, with a view to the assessment and collection thereof. Any portion of the amount so assessed, not paid within thirty days from the date of notice and demand from the Collector, will bear interest at the rate of one per centum per month from the date of such notice and demand, unless an extension should be granted.

Within sixty days (not counting Sunday as the six-
16 tieth day) after the mailing of this notice, you may, in accordance with the provisions of Section 308 of the Revenue Act of 1926, file a petition with the Board of Tax Appeals for a redetermination of the deficiency. The address of the Board is, United States Board of Tax Appeals, Earle Building, 13th & E Streets, Northwest, Washington, D. C.

No claim in abatement of any deficiency which may be assessed in this case will be entertained.

If you acquiesce in this determination, either in whole or in part, you are requested to sign the enclosed waiver of restrictions on the assessment and collection of so much of the deficiency as results from the adjustments in which you acquiesce and forward it to the Commissioner of Internal Revenue, Washington, D. C., marked for the attention of the Estate Tax Division, Miscellaneous Tax Unit.

Respectfully,

(Signed) D. H. Blair,
Commissioner.

Enclosures
aho

17 UNITED STATES BOARD OF TAX APPEALS.

Harold T. Griswold, W. W. S. Carpenter and Laird Bell, Executors, Estate of William H. Redington, Chicago, Ill.,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent
} Docket No. 21942.

ANSWER.

Filed Feb 15 1927.

The Commissioner of Internal Revenue by his attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations set forth in paragraph of the petition numbered 1.

2. Admits the allegations set forth in paragraph of the petition numbered 2.

3. Admits the allegations set forth in paragraph of the petition numbered 3.

4. Denies that the determination of the deficiency tax is based upon errors as alleged in the paragraph of the petition numbered 4.

5 (a). Admits the allegations set forth in subrapagraph (a) of the paragraph of the petition numbered 5.

18 5 (b). Admits the allegations set forth in subparagraph (b) of the paragraph of the petition numbered 5 except so much thereof as alleges that the Commissioner's computation of the residue of the decedent's estate is as alleged in said subparagraph on page 8 thereof, and specifically denies said allegation.

5 (c) and (d). Denies the allegations set forth in subparagraphs (c) and (d) of the paragraph of the petition numbered 5.

6. Denies generally and specifically each and every other allegation contained in the petition of this taxpayer not hereinbefore expressly admitted or denied.

Wherefore, it is respectfully prayed that the determination of the Commissioner be approved.

A. W. GREGG,
General Counsel,
Attorney for the Commissioner of Internal Revenue.

Of Counsel:
J. F. GREANEY,
Special Attorney,
Bureau of Internal Revenue.

19 UNITED STATES BOARD OF TAX APPEALS.

Harold T. Griswold, W. W. S. Carpenter and Laird Bell, Executors, of the Estate of William H Redington, Deceased,
Petitioners,
vs.
Commissioner of Internal Revenue,
Respondent
} Docket No. 21942.

STIPULATION.

Filed Jan 28 1931.

It is hereby stipulated and agreed, by and between the parties to the above-entitled case, through their respective counsel, as follows:

(1) That William H. Redington, the decedent in the above-entitled case, died a resident of Evanston, Illinois, on October 8, 1923, and was survived by his wife Frances A. Redington.

(2) That on or about October 5, 1909, the decedent, being the owner thereof, conveyed through an intermediary to himself and his wife, Frances A. Redington, as joint tenants and not as tenants in common, certain real estate situated in Evanston, Illinois, and used by him and his wife as a homestead; that title to said property vested upon delivery of said deed in the decedent and his wife as such joint tenants with the right of survivorship under the laws of Illinois; that Frances A. Redington made no contribution at any time to the cost of the said real estate and that the said real estate

is the same property valued by the respondent at $90,000 and included in the gross estate by the respondent as subject to the Federal Estate tax referred to in paragraph 4, subdivision (a) and paragraph 5, subdivision (a) of the petition filed in this case.

20 (3) That the petitioner does not question the value of $90,000 placed upon this property by the respondent in determining the deficiency, the only question raised with reference to the respondent's action in this connection being whether any part or all of the value of said jointly owned property is subject to the Federal Estate tax.

(4) That the issues raised in the petition in subdivisions (b), (c), and (d) of paragraph 4 are expressly waived and abandoned by the petitioner for the reason that an agreement has been reached with the respondent with reference thereto and such agreement is given effect in the paragraphs immediately following in this stipulation.

(5) That if the Board sustains the respondent's action in this case in including for purposes of the Federal Estate tax the entire value of the jointly owned property, then the deficiency in the estate tax in this case is $9,736.55.

(6) That if the Board sustains the petitioner's contentions and holds that no part of the value of the said jointly owned property is subject to the Federal Estate tax, then the deficiency in the estate tax in this case is $736.55.

(7) That if the Board decides that only one-half of the value of the jointly owned property is subject to the Federal Estate tax in this case, then the deficiency in the estate tax is $5,236.55.

21 (8) It is understood and agreed between the parties that the stitpulations hereby entered into shall not be construed or held as having the effect of waiving any rights to take appropriate preceedings to contest the correctness of any decision that may be rendered by the Board of Tax Appeals in this case.

(Sgd) LAIRD BELL
Counsel for Petitioner.

(Signed) C. M. CHARSET
General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.

22 (Caption)

Promulgated June 9, 1931.

An estate of joint tenancy in Illinois real estate was created in 1909 between the decedent and his wife. The decedent died in 1923. Held that only one-half of the value of such property is to be included in the gross estate of the decedent for the purpose of the estate tax. *Mary Allen Emery, Executrix,* 21 B. T. A. 1038, followed.

Laird Bell, Esq., and Stiles W. Burr, Esq., for the petitioners.

R. F. Staubley, Esq., for the respondent.

This proceeding is for the redetermination of a deficiency in estate tax of $11,273.06. In a stipulation filed by the parties the petitioners, as the result of an agreement reached by them and the respondent, abandoned all the issues raised in the petition except one, namely, the correctness of the respondent's action in including in the gross estate of the decedent the amount of $90,000 representing the entire value of real estate held, at the time of the decedent's death, by him and his wife as joint tenants with the right of survivorship under deed dated and delivered October 5, 1909. The case was submitted on stipulation from which we make the following:

23 FINDINGS OF FACT.

William H. Redington died a resident of Evanston, Illinois, on October 8, 1923 and was survived by his wife Frances A. Redington.

On or about October 5, 1909, the decedent, being the owner thereof, conveyed through an intermediary to himself and his wife, Frances A. Redington, as joint tenants and not as tenants in common, certain real estate situated in Evanston, Illinois, and used by him and his wife as a homestead. Title to the property vested, upon delivery of the deed, in the decedent and his wife as joint tenants with the right of survivorship under the laws of Illinois. Frances A. Redington made no contribution at any time to the cost of the said real estate. The said real estate was valued by the respondent at $90,000 and was included by him in the decedent's gross estate as subject to tax.

OPINION.

Trammell: The petitioners do not question the value of $90,000 placed by the respondent on the property held jointly but contend that under the Revenue Act of 1921 no part of such property it to be included in the decedent's taxable estate.

With respect to the inclusion in the gross estate of property held jointly section 402 of the Revenue Act of 1921 provides as follows:

> That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * * *
>
> (d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to
> 24 have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth; *Provided,* that where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person; *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof

In *Mary Allen Emery, Executrix,* 21 B T. A. 1038, we had occasion to construe the above quoted provisions of section 402 in connection with facts similar to those in the instant case. In the *Emery* case certain other parties on April 1,

1920 conveyed by deed certain real estate situated in Illinois, to John T. Emery, and his wife, Mary Allen Emery, in joint tenancy. Thereafter on December 25, 1921 Emery died. In determining a deficiency in estate tax against Emery's estate the respondent included in the gross estate the full value of the property held in joint tenancy. We found that in Illinois the common law conception of joint tenancy prevails and that each joint tenant has a legal right of severance which may be exercised at any time by either tenant prior to his death and thereby defeat the rights of the survivor in the interest of the other joint tenant. We accordingly concluded that under the decision in *Tyler* v. *United States,* 281 U. S. 497 the death of Emery resulted in the "enlargement of property rights" to his wife in a sense which required the inclusion in the gross estate of the decedent of at least one-half of the value of the property held jointly by him and his wife at the time of his death.

25 We also considered the question as to whether the other one-half of the property held in joint tenancy which had vested in the survivor upon the creation of the joint tenancy and as to which a right of severance existed on the part of the survivor could be included in the gross estate of the decedent when such tenancy was created prior to the enactment of the applicable act under which the estate tax was being imposed. In connection with this question we considered and relied on the decision in *Knox* v. *MsElligott,* 258 U. S. 546 wherein was involved section 202 (c) of the Revenue Act of 1916, as amended by the Revenue Act of 1917, in which the provision with respect to the taxation of joint property, in so far as material, was not unlike that contained in the above-quoted provisions of section 402. The joint tenancy involved in *Knox* v. *McElligott* was created prior to the effective date of the applicable act. The court held that the statute could not be given a retroactive effect, and that one-half of the jointly owned property which vested in the survivor upon creation of the joint tenancy and as to which a right of severance existed on the part of the survivor throughout the existence of the joint tenancy should not be included in the gross estate of the decedent for estate tax purposes. In the case of *Schwab* v. *Doyle,* 258 U. S. 529 the court considered the retroactive application of a somewhat similar statute and held that it was not retroactive. Upon the authority of these decisions we held in the *Emery* case that since the joint tenancy of Emery and his wife was

created prior to the enactment of the act in effect when he died and since such act was not made specifically retroactive, only one-half of the property held jointly by them should be included in the gross estate subject to the estate tax.

26 The petitioner concedes the similarity of the facts in the instant case to those in the *Emery* case and that our decision in that case is contrary to their contention that no part of the value of the property held jointly by Redington and his wife at the time of his death is to be included in the gross estate subject to tax. They insist, however, that our construction of the above-quoted provisions of section 402 in connection with the decisions in *Schwab* v. *Doyle, supra, Knox* v. *McElligott, supra* and similar cases is in error in that it holds that one-half of the value of the property held jointly is to be included in the gross estate subject to tax notwithstanding the fact that decedent's interest in such property was created prior to the effective date of the act under which it is taxed.

While in our decision in the *Emery* case we did not specifically discuss the question of retroactivity in reaching the conclusion that one-half of the value of the property held jointly was to be included in the gross estate subject to tax we think that in view of the reasoning of the court in *Tyler* v. *United States, supra,* and upon which our decision was based, it is immaterial in so far as one half interest is concerned whether the interest of the decedent be created before or after the enactment of the act in effect at the time of his death. In the *Tyler* case the court said that the question is "whether the death has brought into being or ripened

27 for the survivor property rights of such character as to make appropriate the imposition of a tax". While the *Tyler* case involved estates by the entirety the principle there enunciated is equally applicable here with respect to one half interest. Prior to the death of the decedent in the instant case he had a legal right of severance which he could have exercised at any time prior to his death and could have thereby defeated the right of the survivor, his wife, in his interest in the property. He could have conveyed his share and his wife could have conveyed hers. *Lawler* v. *Byrne,* 252 Ill. 194, 96 N. E. 892; *Szymczak* v. *Szymczak,* 206 Ill. 541, 138 N. E. 218. Either husband or wife could have mortgaged his or her interest or subjected it to a mechanic's lien. *Hardin* v. *Wolf,* 318 Ill. 48, 148 N. E. 868. Either party could have brought suit for partition. *Barr* v. *Barr,* 273 Ill. 621, 113 N. E. 36. Each joint tenant was entitled to half the rents

and profits *Barr* v. *Barr, supra.* The decedent's death extinguished those substantial rights and resulted in the entire interest in his property, property rights and benefits not theretofore owned, being vested in the survivor. We therefore think that the date on which the interest of the deceased joint tenant was created is not material, in so far as one half interest, that owned and seized by the decedent is concerned, since his right and interest in the property was not transferred or released to the survivor until his death, see *Ada M. Slocum, Executrix,* 21 B. T. A. 169, but that such half of the joint tenancy should be included in the gross estate. *Mary Allen Emery, supra.*

With respect to the interest owned by the wife in the joint tenancy, the case at bar is even stronger than the *Emery*
28 case. In this case the joint tenancy was created in 1909 before the enactment of any legislation which imposed a tax upon estates of any character. In the *Emery* case the joint tenancy was created in 1920. We think that this interest having been created prior to any taxing statute is not subject to the estate tax under the 1921 Act.

The parties having stipulated that if we hold that only one-half of the value of the jointly owned property is to be included in the decedent's gross estate subject to tax the amount of the deficiency is $5,236.55. Accordingly,

Judgment will be entered determining a deficiency of $5,236.55.

29 * * (Caption) * * Entered 1931.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated June 9, 1931, it is

Ordered and Decided: That there is a deficiency in estate tax of $5,236.55.

Entered Jun 11 1931.

Enter:

(Signed) LOGAN MORRIS,
Member.

A True Copy.

Teste:

B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

(Seal)

Nov. 17, 31. 30 * * (Caption) * *

PETITION FOR REVIEW.

Filed Nov. 17, 1931.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit:

Your petitioners, Harold T. Griswold, W. W. S. Carpenter and Laird Bell, Executors of the Estate of William H. Redington, deceased, respectfully represents as follows:

I.

Jurisdiction for review.

This is a proceeding for review by the United States Circuit Court of Appeals for the Seventh Circuit, of a decision of the United States Board of Tax Appeals entered on the 11th day of June, 1931, redetermining a deficiency in estate tax against the Estate of William H. Redington, deceased, in the amount of $5,236.55.

31 Your petitioners are the duly appointed and qualified executors of the said estate. All of them are and have been for a considerable time prior to the filing of this petition, citizens and inhabitants of the United States and of the State of Illinois. The address of your petitioners is 846 West Congress Street, Chicago, Illinois.

II.

Nature of Controversy.

The question before the Board of Tax Appeals was whether any portion of property held at the time of the decedent's death, by the decedent and his wife as joint tenants under a deed executed in 1909, should be included in the decedent's gross estate.

The decedent died a resident of Evanston, Illinois on October 8, 1923, and was survived by his wife, Frances A. Redington. The Revenue Act of 1921 was then in force. On or about October 5, 1909, the decedent, being the owner thereof, conveyed, through an intermediary, to himself and

his wife, Frances A. Redington, as joint tenants, certain real estate situated in Evanston, Illinois and used by him and his wife as a homestead. Title to the property vested upon delivery of the deed, in the decedent and his wife as joint tenants with the right of survivorship under the laws of Illinois. Frances A. Redington made no contribution at any time to the cost of said real estate. The said real estate
32 was valued by the Commissioner of Internal Revenue at $90,000, and was included by him in the decedent's gross estate as subject to tax.

On appeal to the Board of Tax Appeals the above facts were stipulated by the parties and were found by the Board. The Board held that one-half of the value of the said real estate should be included in the decedent's gross estate, and redetermined the deficiency accordingly. The sole question here is whether the action of the Board in so holding is correct.

III.

Assignments of Error.

Your petitioners further show that they are aggrieved by the action of the Board of Tax Appeals and injured thereby, and that the errors complained of are as follows:

1. The said Board erred in holding that any portion of the value of the real estate above mentioned should be included in the decedent's gross estate subject to tax.

2. The said Board erred in not holding that no portion of the value of the said real estate should be included in the decedent's gross estate subject to tax.

3. The said Board erred in construing Section 402(d) of the Rvenue Act of 1921 so as to require the inclusion in the decedent's gross estate of any portion of the said real estate.

33 4. The said Board erred in redetermining the deficiency at $5,236.55 and in not redetermining it at $736.55 (which is the agreed amount of the deficiency in case the value of the said real estate is excluded from the gross estate).

Wherefore, your petitioners pray that this court may review the decision of the United States Board of Tax Appeals in this cause, directing the said Board to redetermine the deficiency by not including any portion of the value of the said real estate in the decedent's gross estate which is

subject to tax; and that this court may grant such other and further relief as may appear proper in the premises.

DARRELL S. BOYD
THOMAS L. MARSHALL
STILES W. BURR
Attorneys for Petitioners
134 South La Salle Street,
Chicago, Illinois.

34 State of Illinois }
County of Cook } ss.

DARRELL S. BOYD, being duly sworn, on oath deposes and says that he is one of the attorneys of record for the petitioners named in the foregoing petition; that the said petition was prepared under his supervision; that he is familiar with the contents thereof; that the allegations of fact contained therein are true to the best of his knowledge, information, and belief; that the said petition is not filed for purposes of delay; and that he believes the petitioners are justly entitled to the relief sought.

DARRELL S. BOYD

Subscribed and sworn to before me, this 13th day of November, 1931.

WM. N. HADDAD
(Seal) *Notary Public.*

* * (Caption) * *

Filed Nov 17 1928.

NOTICE.

To: C. M. Charest, Esq., General Counsel Bureau of Internal Revenue, Attorney for Respondent.

You Are Hereby Notified that a Petition for Review in the above entitled cause was filed with the United States Board of Tax Appeals on the 17th day of November, 1931.

A copy of said petition is served upon you herewith.

DARRELL S. BOYD
THOMAS L. MARSHALL
STILES W. BURR
Attorneys for Petitioners,
134 South LaSalle Street,
Chicago, Illinois.

Service of the foregoing notice and a copy of the petition therein referred to is hereby accepted this 17th day of November, 1931.

C. M. CHAREST
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

36 * * * (Caption) * *

PRAECIPE FOR TRANSCRIPT.

Filed Dec 2 1931.

To the Clerk of the United States Board of Tax Appeals:

Please prepare a transcript of record in this cause and on or before December 11, 1931, transmit the same to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit at Chicago, Illinois, and include in said transcript copies duly certified as correct, of the following documents:

1. The docket entries of proceedings before the Board in the above entitled cause.
2. Petition filed December 16, 1926.
3. Respondent's answer filed February 15, 1927.
4. Stipulation of facts filed on or about January 28, 1931.
5. Findings of fact and opinion of the Board promulgated June 9, 1931.
6. Order of redetermination entered on June 11, 1931.

37 7. Petition for review filed November 1931.
8. This praecipe for transcript.
9. Notice of filing of petition for review and acknowledgment of service.

DARRELL S. BOYD
Attorney for Petitioners.

AGREEMENT TO PRAECIPE.

We hereby agree that the above and foregoing praecipe is correct; that the records, documents, papers and proceedings therein set forth are sufficient for a complete record in this cause on appeal; and we hereby adopt the foregoing as a list designated by each of the parties to this cause to complete said transcript; and we hereby waive the issuance and service of notice upon any party hereto, and agree that said praecipe shall be obeyed and acted upon by the clerk as fully and to all intents and purposes in the same manner as if said praecipe had been regularly filed and a true copy thereof had been served upon each party hereto.

DARRELL S. BOYD
Attorney for Petitioners
C. M. CHAREST
General Counsel, Bureau of Internal Revenue, Attorney for Respondent.

38 • • (Caption) • •

CERTIFICATE.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 37, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 22nd day of December A. D. 1931.

B. D. GAMBLE
Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 24, inclusive, contain a true copy of the printed record, printed under my supervision and filed on the 23rd day of January, 1932, on which the following entitled cause was heard and determined:

Harold T. Griswold, *et al.*,
Petitioners,

vs.

Commissioner of Internal Revenue,
Respondent,

No. 4719, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 6th day of April, A. D. 1933.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court Room in the City of Chicago in said Seventh Circuit on the sixth day of October, 1931, of the October Term in the year of our Lord one thousand Nine Hundred and thirty-one and of our Independence the one hundred and fifty-sixth.

Harold T. Griswold, W. W. S. Carpenter and Laird Bell, Executors of the Estate of William H. Redington, Deceased
4719 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Order of the United States Board of Tax Appeals.

And on the fifth day of January, 1932, there was filed in the office of the Clerk of this Court an appearance of counsel for petitioner, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4719. October Term, 1932.

Harold T. Griswold, *et al.*,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent.

The Clerk will enter my appearance as counsel for the Petitioner.

DANIEL S. BOYD,
THOMAS L. MARSHALL,
134 S. La Salle St.,
Chicago, Ill.
STILES W. BURR,
Willard Hotel,
Washington, D. C.

Endorsed: Filed January 5, 1932. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the fifth day of January, 1932, there was filed in the office of the Clerk of this court an appearance of counsel for respondent, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4719. October Term, 1932.

Harold T. Griswold, W. W. S. Carpenter and Laird Bell, Executors of the Estate of W. H. Redington,

vs.

Commissioner of Internal Revenue.

The Clerk will enter my appearance as counsel for the respondent.

G. A. YOUNGQUIST,
C. M. CHAREST,
DWIGHT H. GREEN.

Endorsed: Filed January 5, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the twenty-third day of March, 1932, the following further proceedings were had and entered of record, to-wit:

Wednesday, March 23, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. William M. Sparks, Circuit Judge.

Harold T. Griswold, *et al.*,
4719 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Order of the United States Board of Tax Appeals.

It is now here ordered that this cause be heard with cause number 4699—Commissioner of Internal Revenue *vs.* Mary Allen Emery, Executrix, etc.

And afterwards, to-wit: On the twelfth day of April, 1932, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 12, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Harold T. Griswold, *et al.*,
4719 *vs.*
Commissioner of Internal Revenue.

Petition for Review of Order of the United States Board of Tax Appeals.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on May 6, 1932.

And afterwards, to-wit: On the sixth day of May, 1932, the following further proceedings were had and entered of record, to-wit:

Friday, May 6, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. William M. Sparks, Circuit Judge.
Hon. James H. Wilkerson, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Harold T. Griswold, *et al.*,
4719 *vs.*
Commissioner of Internal Revenue.
} Petition for Review of Order of the United States Board of Tax Appeals.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. W. N. Haddad, counsel for petitioner, and by Mr. William Cutler Thompson, counsel for respondent, and the court having heard the same takes this matter under advisement.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit on the fourth day of October, 1932, of the October Term in the year of our Lord One Thousand Nine Hundred and Thirty-two, and of our Independence the One Hundred and Fifty-seventh.

And afterwards, to-wit: On the twenty-sixth day of November, 1932, there was filed in the office of the Clerk of this court the opinion of the court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

October Term and Session, 1932.

Commissioner of Internal Revenue,
Petitioner,
No. 4699. *vs.*
Mary Allen Emery, Executrix of the Estate of John T. Emery,
Respondent.

Harold T. Griswold *et al.*, Executors of the Estate of William H. Redington, Deceased,
Petitioners,
No. 4719. *vs.*
Commissioner of Internal Revenue,
Respondent.

Petitions for Review of Decisions of the United States Board of Tax Appeals.

November 26, 1932.

Before ALSCHULER and SPARKS, *Circuit Judges,* and WILKERSON, *District Judge.*

ALSCHULER, *Circuit Judge.* (No. 4699, *re* Emery.) Petitioner seeks review of an order of redetermination of a deficiency in the estate tax of John T. Emery, deceased.

Decedent, a resident of Illinois, died December 25, 1921.

April 21, 1920, the Illinois real estate here in question was deeded by the grantors to the decedent and Mary Allen Emery, his wife, "not in tenancy in common, but in joint tenancy." It does not appear that prior to the conveyance the wife had any title or ownership in the real estate, or that she made any contribution to its purchase.

It is not important whether the estate thus created be denominated a joint tenancy or a tenancy by the entirety; both are included in the taxing statute, and any distinction between them is not here material. For convenience we herein call it joint tenancy.

Respondent, the wife and executrix of decedent, included in her return of decedent's property for federal estate tax purposes one-half of the total value of $65,000 of this real estate. Petitioner maintains that the entire value of the property was includable in the gross estate of decedent. The Board of Tax Appeals found against petitioner's contention, declining to require the other one-half to be included in the return. The only question is as to the correctness of the Board's conclusion.

Decedent's death occurred while the Revenue Act of 1921 was in force, and the Board held that one-half of the estate granted by the joint tenancy deed of 1920 having been, by the terms of that deed, vested in the joint tenant Mary Allen Emery, now to tax the vested estate under the Revenue Act of 1921 would be giving to that statute retroactive effect, which would be contrary to the holding of the Supreme Court in *Knox* v. *McElligott*, 258 U. S. 546.

This case dealt with a situation where the joint tenancy in husband and wife was created in 1912, at the time when there was no federal estate tax. The death of one of the joint tenants occurred in 1917, while the Revenue Act of 1916, creating an estate tax, was in force. This Act provided:

> "SEC. 201. That a tax (hereinafter in this title referred to as the tax), equal to the following percentages of the value of the net estate, to be determined as provided in section two hundred and three, is hereby imposed upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or nonresident of the United States: * * *
>
> "SEC. 202. That the value of the gross estate of the decedent shall be determined by including the value at the

time of his death of all property, real or personal, tangible or intangible, wherever situated: * * *

"(c) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent."

The Knox case holds that to tax the entire joint estate as property of the decedent would be in effect taxing the half which before the act was passed had vested in the wife, and would be giving the 1916 Act a retroactive effect, which would be unconstitutional, citing as basis for its opinion the decision in *Shwab* v. *Doyle*, 258 U. S. 529, decided about the same time.

If the joint tenancy here in question had been created before the 1916 statute, we would have the same situation as in the Knox case. When, however, the joint tenancy here was created there was in force the Revenue Act of 1918, in which there were enacted [Sec. 402(d)] the same provisions respecting taxation of joint tenancies and estates by the entirety as provided in the 1916 Act. If, therefore, the death had occurred while the 1918 Act was in force, unquestionably the estate tax on the entire joint property, as fixed in the 1918 Act, would have had application. In such case it could not be said that the estate was created and became vested without contemplation of the provisions of the statute, as pointed out in *Tyler* v. *United States*, 281 U. S. 497, and *Phillips* v. *Dime Trust and S. D. Co.*, 284 U. S. 160.

But it happens that the provisions of the 1918 Revenue law in this respect are identical with those of the Revenue law of 1921. Can it in such case be said that this joint tenancy was created without regard to or without contemplation of the statutory provision for the levying of the estate tax upon the whole joint estate, when upon the death of one of the joint tenants the survivor succeeds to the entire estate?

It is well recognized in statutory construction that where the provisions of an existing statute are repeated and carried into the succeeding statute, rights and liabilities accruing under the former are preserved by the latter notwithstanding the latter makes provisions for repeal of the former without

incorporating a saving clause. *Pacific Mail Steamship Co.* v. *Joliffe,* 2 Wall. 450; *Bear Lake & River Water Works & Irrig. Co.* v. *Garland,* 164 U. S. 1, 11 *et seq.; Goublin* v. *United States,* 261 Fed. 5, 10 (C. C. A. 9), and cases and authority therein cited.

We see no reason why this principle is not here applicable. Some years before the estate in question was created the government had declared its policy of imposing such a tax, and at no time since has it receded from that policy. Declared by the 1916 Act, it has ever since remained in substantially the same form, the Acts of 1918 and 1921 not changing the policy but merely carrying it forward. The Act of 1921 did not impose a new burden not contemplated at the time the estate was created, as was the situation in the Knox case.

In *Klein* v. *United States,* 283 U. S. 231, arising under the 1918 Act, the court recognized this principle, saying:

> "The provision of the Revenue Act of 1918, so far as it seeks to tax the transfer in question, is assailed as unconstitutional because, it is said, the transfer was complete and irrevocable before the act was passed. * * But the deed under review, while made before the enactment of the Revenue Act of 1918, was made after the Act of 1916, * * which, with an addition not pertinent here, contained (Sec. 202) exactly the same provision; and the contention, for that reason, other grounds aside, is without merit."

In *Milliken* v. *United States,* 283 U. S. 15, where the statute was being interpreted as applicable to a gift, as in the Klein case, the court, after concluding that a tax is not necessarily and certainly arbitrary, and therefore not invalid because retroactively applied, said at p. 22:

> "Hence, in challenging the present tax it does not suffice to say that the gift antedated the statute (1918). It is necessary to consider the nature of the tax and of the decedent's gift. When the gift was made it was subject to the provisions of the 1916 Revenue Act. By it, Congress had adopted the well understood system of taxation of transfers of property at death, already in force in forty-two states. * * A characteristic feature of the system was that incorporated in Sections 202 (b) of the 1916 Act and 402 (c) of the 1918 Act, both of which im-

posed a tax on gifts made in contemplation of death, computed at the same value and rate as though the property given had been a part of the donor's estate passing at death.

* * * * * *

The present gift was subject to the excise when made; and for reasons already indicated, we think a mere increase in the tax, pursuant to a policy of which the donor was forewarned at the time he elected to exercise the privilege, did not change its character."

We conclude that the entire estate created by this transfer in joint tenancy was taxable, and the order of the Board of Tax Appeals is reversed, and the cause is remanded to the Board with direction to redetermine the tax accordingly.

(No. 4719, *re* Griswold *et al.*) In this case the facts are in all material respects like those in No. 4699, except that the joint tenancy (or tenancy by the entirety) in the deceased and his wife was created in 1909. After the death in 1923 of the husband tenant, petitioners, as his executors, in their return for federal estate tax, did not include any of the value of this joint property which deceased in his lifetime thus held jointly with his surviving wife, to whom no part of the property ever originally belonged.

The Commissioner redetermined the tax on the basis that the entire value of the joint property was taxable. On appeal the Board of Tax Appeals determined that one-half was taxable, and both petitioner and Commissioner sought review. The latter appeal has since been dismissed on motion of the Commissioner.

Petitioners contend that this estate became fixed and vested in each of these joint tenants when the estate was created, at a time when there was no federal law for death taxes upon the value of joint estates, and that the subsequently adopted statute could not reach it.

While much of what was said in the Emery case has bearing here, this precise question was not there present. It seems to us that the holding of the Supreme Court in *Tyler* v. *United States,* 281 U. S. 486, is here controlling. Involved in that case were death taxes maturing on the value of joint estates passing to the survivor on the death of a joint cotenant or tenant by the entirety. The tenancies there were

created during the time the taxing law was in force. Marginal note 1 is an applicable quotation from the opinion.

NOTE 1. "Death duties rest upon the principle that death is the 'generating source' from which the authority to impose such taxes takes its being, and 'it is the power to transmit or the transmission or receipt of property by death which is the subject levied upon by all death duties.' *Knowlton* v. *Moore*, 178 U. S. 41, 56, 57. But mere names and definitions, however important as aids to understanding, do not conclude the lawmaker, who is free to ignore them and adopt his own. *Karnuth* v. *United States*, 279 U. S. 231, 242. A tax laid upon the happening of an event, as distinguished from its tangible fruits, is an indirect tax which Congress, in respect of some events not necessary now to be described more definitely, undoubtedly may impose. If the event is death and the result which is made the occasion of the tax is the bringing into being or the enlargement of property rights, and Congress chooses to treat the tax imposed upon that result as a death duty, even though, strictly, in the absence of an expression of the legislative will, it might not thus be denominated, there is nothing in the Constitution which stands in the way.

"The question here, then, is, not whether there has been, in the strict sense of that word, a 'transfer' of the property by the death of the decedent, or a receipt of it by right of succession, but whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

"According to the amiable fiction of the common law, adhered to in Pennsylvania and Maryland, husband and wife are but one person, and the point made is, that by the death of one party to this unit no interest in property held by them as tenants by the entirety passes to the other. This view, when applied to a taxing act, seems quite unsubstantial. The power of taxation is a fundamental and imperious necessity of all government, not to be restricted by mere legal fictions. Whether that power has been properly exercised in the present instance must be determined by the actual results brought about by the death, rather than by a consideration of the artificial rules which delimit the title, rights and powers of tenants by the entirety at common law. See *Nicol* v. *Ames*, 173 U. S. 509, 516; *Saltonstall* v. *Saltonstall*, *supra*, p. 271.

"Taxation, as it many times has been said, is eminently practical, and a practical mind, considering results, would have some difficulty in accepting the conclusion that the death of one of the tenants in each of these cases did not have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such survivor. Before the death of the husband (to take the Tyler case, No. 428,) the wife had the right to possess and use the whole property, but so, also; had her husband; she could not dispose of the property except with her husband's concurrence; her rights were hedged about at all points by the equal rights of her husband. At his death, however, and because of it, she, for the first time, became entitled to exclusive possession, use and enjoyment: she ceased to hold the property subject to qualifications imposed by the law relating to tenancy by the entirety, and became entitled to hold any enjoy it absolutely as her own; and then, and then only, she acquired the power, not theretofore possessed, of disposing of the property by an exercise of her sole will. Thus the death of one of the parties to the tenancy became the 'generating source' of important and definite accessions to the property rights of the other. These circumstances, together with the fact, the existence of which the statute requires, that no part of the property originally had belonged to the wife, are sufficient, in our opinion, to make valid the inclusion of the property in the gross estate which forms the primary base for the measurement of the tax."

This seems to us to fix as the basis, for inclusion for taxation, so much of the joint property as augmented the estate of the survivor through the death of the co-tenant. It is our view that this must be determined as of the time of the death. If the law at that time authorized the taxation of the estate which passed by the death, it would be immaterial when the joint estate was first created—whether before or after the enactment of the taxing statute.[2]

If at the time of the death "the practical mind" would conclude "that the death of one of the tenants" did then "have the effect of passing to the survivor substantial rights, in respect of the property, theretofore never enjoyed by such "survivor," it would follow that the death was "the generating source" of these accessions, and the taxing statute in force at the death would apply.

The Board, evidently assuming that for purposes of taxation the same practical mind would consider that half of the joint estate vested in the deceased at the time of its creation, fixed the value of the accession to the property rights of the surviving tenant through the death at half the value of the entire joint estate, and this appeal relates only to the inclusion of the half for taxation. There is no question here as to the taxability of the other half. We conclude that the order of the Board of Tax Appeals must be and it is

AFFIRMED.

Endorsed: Filed Nov. 26, 1932. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the twenty-sixth day of November, 1932, the following further proceedings were had and entered of record, to-wit:

NOTE 2. See *Gwinn* v. *Commissioner*, ... U. S. ....., Decided Dec. 5, 1932.

Saturday, November 26, 1932.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. James H. Wilkerson, District Judge.

Harold T. Griswold, W. W. S. Carpenter and Laird Bell, Executors of the Estate of William H. Redington, Deceased,
4719 *vs.*
Commissioner of Internal Revenue

Petition for Review of Order of the United States Board of Tax Appeals.

This cause came on to be heard on the transcript of the record from the United States Board of Tax Appeals and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this court that the decision entered in this cause on June 11, 1931, by the United States Board of Tax Appeals be, and the same is hereby affirmed.

And afterwards, to-wit: On the sixteenth day of December, 1932, there was filed in the office of the Clerk of this court a petition for a rehearing, which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the twenty-eighth day of January, 1933, the following further proceedings were had and entered of record, to-wit:

Saturday, January 28, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Suarks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Samuel Alschuler, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. James H. Wilkerson, District Judge.

Harold T. Griswold, *et al.*, etc.
4719 *vs.*
Commissioner of Internal Revenue

Petition for Review of Order of the United States Board of Tax Appeals.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby denied.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 27 to 39, inclusive, contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, and stipulations, and orders relating to the filing of briefs, and the petition for rehearing) in the case of

Harold T. Griswold, *et al.*, etc.,
Petitioner,

vs.

Commissioner of Internal Revenue,
Respondent,

No. 4719, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 6th day of April, A. D. 1933.

FREDERICK G. CAMPBELL,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
APR 26 1933
CHARLES ELMORE CRO
CLERK

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No. [redacted] 38

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND LAIRD BELL, EXECUTORS OF THE ESTATE OF WILLIAM H. REDINGTON, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WALTER T. FISHER,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

Nov.

INDEX.

	PAGE
Petition for writ of certiorari	1
Brief in support	5
Opinions below	5
Jurisdiction	5
Statement of the case and of the question presented	5
Specification of errors	5
Argument	6

CITATIONS.

Cases:

Carter v. English, (C. C. A. 9th) 15 F. (2d) 6	3, 9
Gwinn v. Commissioner, 287 U. S.	10
Hernandez v. Becker, (C. C. A. 10th) 54 F. (2d) 542	3, 9
Kaufman v. Reinecke, (N. D. Ill.) F. Supp.	3
Knox v. McElligott, 258 U. S. 546	3, 6, 8
Levy v. Wardell, 258 U. S. 542	7
Lynch v. Congdon, (C. C. A. 8th) 1 F. (2d) 133	2, 4, 9
Safety Deposit & Trust Company v. Tait, (D. Md.) F. Supp.	3
Shwab v. Doyle, 258 U. S. 529	3, 6, 8
Stephenson v. Commissioner, 27 B. T. A.	3
Tyler v. United States, 281 U. S. 497	9
Union Trust Co. v. Wardell, 258 U. S. 537	7
Walker v. Grogan, (E. D. Mich.) 283 Fed. 530, (C. C. A. 6th) 300 Fed. 1004	3
Whitehead v. Commissioner, (C. C. A. 8th) F. (2d)	3

Statutes:

Revenue Act of 1916 (Chap. 463, 39 Stat. 756), Sec. 202 (b), (c) 3
Revenue Act of 1921 (Chap. 136, 42 Stat. 227) Sec. 402 (d) 6
Revenue Act of 1924 (Chap. 234, 43 Stat. 253), Sec. 302 (h) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1932.

No._____

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND LAIRD BELL, EXECUTORS OF THE ESTATE OF WILLIAM H. REDINGTON, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Supreme Court of the United States:

Your petitioners, praying for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Seventh Circuit affirming an order of the United States Board of Tax Appeals, respectfully submit:

This case arises under the estate tax provisions of the Revenue Act of 1921. It involves the taxability as part of the decedent's gross estate, of certain property which

had been held by the decedent and his wife as joint tenants since before the passage of the first estate tax act, and which, upon the decedent's death, passed to his wife by right of survivorship.

On or about October 5, 1909, the decedent conveyed, through an intermediary, to himself and his wife, as joint tenants, certain real estate in Evanston, Illinois. Title to the property vested, upon delivery of the deed, in the decedent and his wife as joint tenants with right of survivorship. The decedent died on October 8, 1923, at which time the Revenue Act of 1921 was in force. The real estate was valued by the respondent at $90,000 and was included by him in the decedent's gross estate as subject to tax. (R. 13.) On appeal to the Board of Tax Appeals, the Board held that one-half the value of the property should be included in the gross estate, and redetermined the tax accordingly. (R. 16, 23 B. T. A. 635.) The Circuit Court of Appeals affirmed the Board's decision. (R. 31, 62 F. (2d) 591.)

The Revenue Act of 1921, unlike the later acts, contains no clause specifically making the section which relates to joint tenancies retroactive. The issue here is whether the act should be applied retrospectively so as to reach joint tenancies created prior to its enactment (and prior to the passage of the first estate tax act containing similar provisions). The constitutionality of the statute—if as a matter of construction it applies to the property in question—is not disputed.

Reasons for Allowance of the Writ.

The decision of the Circuit Court of Appeals in this case is in conflict with the following decisions of other Circuit Courts of Appeals on the same question:

Lynch v. *Congdon,* (C. C. A. 8th) 1 F. (2d) 133.

Carter v. *English*, (C. C. A. 9th) 15 F. (2d) 6.
Hernandez v. *Becker*, (C. C. A. 10th) 54 F. (2d) 542.

It is also in conflict with the reasoning in *Walker* v. *Grogan*, (E. D. Mich.) 283 Fed. 530 (affirmed (C. C. A. 6th) 300 Fed. 1004).

The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court. *Shwab* v. *Doyle*, 258 U. S. 529 and *Knox* v. *McElligott*, 258 U. S. 546 hold that Sections 202 (b) and (c) of the Revenue Act of 1916 do not apply to transfers made and joint tenancies created prior to the passage of that Act. Section 402 (d) of the 1921 Act is, for present purposes, exactly the same as Section 202 (c) of the 1916 Act. The lower court held that previously created joint tenancies are taxable under the 1921 Act. It did this by misapplying *Tyler* v. *United States*, 281 U. S. 497, and other cases on constitutionality which cases have no bearing on the issue in the present case.

The question involved is important. A similar question cannot arise under the 1924 and later acts, because those acts contain retroactive provisions; but many cases are still pending under the old acts. Since the decision in the present case, the following cases involving the same question have been decided:

Whitehead v. *Commissioner* (C. C. A. 8th), ... F. (2d) ..... (decided March 20, 1933).

Kaufman v. *Reinecke* (N. D. Ill.), ... F. Supp. ..... (decided January 17, 1933; reported in 333 C. C. H. at par. 9162).

Safety Deposit & Trust Company v. *Tait* (D. Md.), ... F. Supp. ..... (decided March 27, 1933; reported in 333 C. C. H. at 9242).

Stephenson v. *Commissioner*, 27 B. T. A. .....

(decided February 28, 1933; reported in 337 C. C. H., Dec. 7133).

The decision of the Circuit Court of Appeals for the Eighth Circuit in *Whitehead* v. *Commissioner, supra* is contrary to the decision of the same court in *Lynch* v. *Congdon,* 1 F. (2d) 133. We are informed that a petition for rehearing is about to be filed in the *Whitehead* case.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding the said Court to certify and send to this Court on a day to be designated, a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Statutes of the United States; and that said final orders of the said Circuit Court of Appeals be reversed or altered by this Honorable Court; and they also pray for such other, further, or different relief as may seem proper.

And your petitioners will ever pray, etc.

HAROLD T. GRISWOLD, W. W. S. CARPENTER, and LAIRD BELL, *Executors of the Estate of William H. Redington, Deceased,*
Petitioners.

By WALTER T. FISHER,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinion of the Board of Tax Appeals filed June 9, 1931, is reported in 23 B. T. A. 635, and is also found at Record, page 15. The opinion of the Circuit Court of Appeals for the Seventh Circuit filed November 26, 1932, is reported in 62 F. (2d) 591 and is also found at Record, page 31.

Jurisdiction.

The judgment to be reviewed was entered by the Circuit Court of Appeals for the Seventh Circuit on November 26, 1932. (R. 38.) A petition for rehearing was denied on January 28, 1933. (R. 39.) A writ of certiorari is asked under Section 240 of the Judicial Code (Act of Mar. 3, 1911, c. 231, § 240, 36 Stat. 1157 as amended February 13, 1925, c. 229, § 1, 43 Stat. 938).

Statement of the Case and of the Question Presented.

For a statement of the case and of the question presented see this petition, p. 1.

Specification of Errors.

The Circuit Court of Appeals for the Seventh Circuit erred in deciding that any part of the value of the joint property in question, which property passed at the decedent's death to his wife by right of survivorship, is taxable as a part of the decedent's gross estate under Section 402 (d) of the Revenue Act of 1921.

ARGUMENT.

We believe that the decision of the court below must be reversed on the authority of *Knox* v. *McElligott*, 258 U. S. 546, and *Shwab* v. *Doyle*, 258 U. S. 529.

The decedent died while the Revenue Act of 1921 was in force. The pertinent section of that act is as follows:

> "[The gross estate shall include property]—
>
> "(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: * * *"

The statute thus taxes the interest in property "held jointly or as tenants in the entirety by the decedent and any other person". Does this mean property held jointly, etc., since before the act was passed; or does it apply only to estates thereafter created? This question was decided in *Knox* v. *McElligott*, 258 U. S. 546, which arose under the corresponding section of the 1916 Act. In that case a New York decedent owned securities which, in 1912, he transferred (through an intermediary) to himself and his wife as joint tenants. He died in 1917. The executrix included in her return and voluntarily paid tax with respect to one-half of the property. The Commissioner included the other half as well and required her to pay an additional tax which she sued to recover back. It was held, on the authority of *Shwab* v. *Doyle*, 258 U. S. 529, that the provision in question does not apply to joint estates created before the enactment of the statute, and that the plaintiff should recover.

Shwab v. *Doyle*, 258 U. S. 529, and its companion cases (*Union Trust Co.* v. *Wardell*, 258 U. S. 537; and *Levy* v. *Wardell*, 258 U. S. 542), hold that Section 202 (b) of the 1916 Act (providing for the inclusion of property which was the subject of a transfer made in contemplation of, or intended to take effect in possession or enjoyment at or after death) is not retrospective and does not apply to transfers made before its enactment. *Knox* v. *McElligott*, 258 U. S. 546, is a similar holding that Section 202 (c) of the 1916 Act (referring to joint tenancies) is not retroactive.

In the 1918 and 1921 Acts, the sections relating to transfers were changed. In each case the clause was added, "whether such transfer or trust is made or created before or after the passage of this Act." So the *Shwab, Union Trust* and *Levy* cases are not in point under the 1918 and later Acts with respect to transfers in contemplation of, or intended to take effect, etc., at death.

But there were no such changes in 1918 and 1921 with respect to joint tenancies. Section 202 (c) of the 1916 Act which was held in *Knox* v. *McElligott* not to be retroactive, is, for present purposes, exactly the same as Section 402 (d) of the 1921 Act. It was not until the 1924 Act (Chap. 234, 43 Stat. 253, effective June 2, 1924) that a clause was added (Sec. 302 (h)) making the section covering joint tenancies retroactive.

It is true that the actual result in *Knox* v. *McElligott* was the inclusion of one-half the joint property. But that was because the taxpayer paid the tax on one-half voluntarily and sued to recover back the tax only with respect to the second half. The only issue before the court was with respect to the second half; and that half was excluded on the ground that the section of the statute referring to joint tenancies does not apply to tenancies previously created.

The statute taxes property "to the extent of the interest therein held jointly," etc. The "interest held jointly" means, of course, the entire value of the property. This meaning is clear from the following clause which excludes such part "as may be shown to have originally belonged to such other person," etc. So where all of the property originally belonged to the decedent, the statute either taxes the entire value or no part of it; and the decision in *Knox* v. *McElligott* that the statute does not reach estates created before its passage is necessarily a decision that no part of such estates is subject to the tax. In other words, as a result of the decision in *Knox* v. *McElligott*, Sections 202 (c) of the 1916 Act and 402 (d) of the 1921 Act must be construed as if they read,

> [The gross estate shall include property]—
> "to the extent of the interest therein held jointly or as tenants in the entirety *under an estate or tenancy created after the passage of this Act.*"

In no other way can the distinction between the 1921 Act and the 1924 Act with respect to joint tenancies be observed. The Revenue Act of 1924 was the first statute which made the joint tenancy provision retroactive. Section 302 (h) of the 1924 Act says,

> "Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates . . . whether made, created, arising, existing, exercised, or relinquished *before or after the enactment of this Act.*" (Italics ours.)

This provision was introduced after the decisions in *Shwab* v. *Doyle*, 258 U. S. 528, and *Knox* v. *McElligott*, 258 U. S. 546. There is no such provision in the earlier acts (as respects joint tenancies) and the cases just cited hold that no such provision can be read into those acts.

Had the taxpayer in *Knox* v. *McElligott* contended that no part of the jointly owned property is taxable, on the reasoning of that case, the contention would have

been upheld. The case has always been so understood by all the lower federal courts. See *Lynch* v. *Congdon,* (C. C. A. 8th) 1 F. (2d) 133; *Carter* v. *English,* (C. C. A. 9th) 15 F. (2d) 6; *Hernandez* v. *Becker,* (C. C. A. 10th) 54 F. (2d) 542. (The decision in the present case is the first departure from this view by any court.) The Commissioner of Internal Revenue recognized this when, in 1926, he amended the regulations under the 1921 Act by adding to Article 23 (which provides for the inclusion of property held jointly) the following sentence:

> "This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death."

On July 3, 1930, the Commissioner reversed his position and amended Article 23 of the regulations further, by striking out the sentence above quoted. (T. D. 4293). This latter amendment came just a few weeks after the decision in *Tyler* v. *United States,* 281 U. S. 497, and was apparently made on the theory that that case overruled *Knox* v. *McElligott.* The decision of the Circuit Court of Appeals in the present case is based upon the same theory.

But *Tyler* v. *United States* did not overrule *Knox* v. *McElligott. Knox* v. *McElligott* was a decision on construction. *Tyler* v. *United States* was one on constitutionality. The *Tyler* case merely holds that the provisions of the 1916 and 1921 acts, which include in the gross estate property held by the decedent and his wife as tenants by the entirety, are not unconstitutional. All of the estates in question in that case were created after the effective date of the applicable statute and there was no question of construction. This court, after reciting the facts in the *Tyler* case, says:

> "The applicable provision of § 202(c) is explicit, and the intent of Congress thereby to impose the

challenged tax is not open to doubt. The sole question is in respect of its constitutional validity." (p. 501.)

The same thing can be said with respect to the other cases relied on by the court below; also with respect to the more recent case of *Gwinn* v. *Commissioner,* 287 U. S. ..... (Dec. 5, 1932). All of these cases are cases on constitutionality and do not touch the question of construction which was decided in *Shwab* v. *Doyle* and *Knox* v. *McElligott.*

Contrary to the impression to be gained from a reading of the opinion of the court below, we have never disputed the constitutionality of the tax in question. We have never said that the subsequently enacted statute could not reach the jointly owned property in this case. Our contention is, and has always been, that the statute does not, as a matter of proper construction, reach this property. We have relied entirely on *Shwab* v. *Doyle* and *Knox* v. *McElligott.* The authority of these cases has never been questioned in any later decision of this court, and we believe that they are controlling of the issue in the present case.

Respectfully submitted,

WALTER T. FISHER,
Counsel for Petitioners.

FILE COPY

FILED
SEP 29 1933
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 38

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND LAIRD BELL, EXECUTORS OF THE ESTATE OF WILLIAM H. REDINGTON, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS.

WALTER T. FISHER,
Counsel for Petitioners.

THE DUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

INDEX.

	PAGE
Brief for Petitioners	1
Argument	2

CITATIONS.

Cases:

Chase National Bank v. United States, 278 U. S. 327	3
Crooks v. Harrelson, 282 U. S. 55	2
Klein v. United States, 283 U. S. 231	3
Knox v. McElligott, 258 U. S. 546	2
Lewellyn v. Frick, 268 U. S. 238	3
May v. Heiner, 281 U. S. 238	3
Shwab v. Doyle, 258 U. S. 529	3
Tyler v. United States, 281 U. S. 497	2

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 38.

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND LAIRD BELL, EXECUTORS OF THE ESTATE OF WILLIAM H. REDINGTON, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

A statement of the case and of the question presented, together with a reference to the opinions below, the grounds on which the jurisdiction of this court is invoked, and a specification of errors, is contained in the petition for certiorari and the supporting brief already filed.

ARGUMENT.

The respondent seeks to uphold the tax in question on the authority of *Tyler* v. *United States*, 281 U. S. 497. His argument seems to be that since there was a taxable event at the death of the decedent, the tax is proper; and he points to the *Tyler* case to show that there was a taxable event. But it is not enough to show that there was a taxable event (see *Crooks* v. *Harrelson*, 282 U. S. 55). In order to justify the tax, the respondent must also show that there is a statute actually taxing that event. This he cannot do. The decedent died while the 1921 Act was in force, and under the authority of *Knox* v. *McElligott*, 258 U. S. 546, that act must be held not to apply to joint estates created before its passage. For this purpose, the date of creation of the estate is very material.

The respondent proposes to distinguish *Knox* v. *McElligott* on the ground that one-half of the property was taxed in that case. But the case cannot be disposed of in that way. The decision was based on the view that the 1916 Act did not apply to tenancies previously created. No middle ground is possible. The statute taxed all property "to the extent of the interest therein held jointly," etc. The interest held jointly, of course, was the entire property and not half of it. So when the court held that the statute did not cover all of the joint property, it necessarily held that the statute did not cover any portion of that property.

In order to affirm the decision in the present case, this court will have to overrule *Knox* v. *McElligott*. The court below and the respondent seem to think that *Knox* v. *McElligott* has already been overruled by *Tyler* v. *United States*. This, of course, is a misapprehension.

The question in *Knox* v. *McElligott* and the question in the present case is the meaning of certain words. Obviously those words must have the same meaning now as they had in 1916 when Congress first used them and in 1921 when this court construed them. Cases like *Tyler* v. *United States* which uphold the power of Congress to tax various interests as a part of a decedent's estate have no bearing on the question. If this court overrules *Knox* v. *McElligott* on the authority of *Tyler* v. *United States*, it may as well overrule *Shwab* v. *Doyle*, 258 U. S. 529, on the authority of *Milliken* v. *United States*, 283 U. S. 15, *Lewellyn* v. *Frick*, 268 U. S. 238, on the authority of *Chase National Bank* v. *United States*, 278 U. S. 327, and *May* v. *Heiner*, 281 U. S. 238, on the authority of *Klein* v. *United States*, 283 U. S. 231. But the principles upon which *Knox* v. *McElligott* and the other cases on construction are based—viz., that a tax statute will not be extended by implication, that a statute will not be given retroactive effect unless its language is "clear, strong, and imperative", and that doubts should be resolved in favor of the taxpayer—are as sound to-day as they were twelve years ago, and we submit that these cases should not be overruled.

Respectfully submitted,

WALTER T. FISHER
Counsel for Petitioners.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute and regulations involved	2
Statement	2
Argument	3
Conclusion	6
Appendix	7

CITATIONS

Cases:	
Carter v. *English*, 15 F. (2d) 6	5
Commissioner v. *Emery*, 62 F. (2d) 591	4
Gurnsey, Estate of., 177 Cal. 211	6
Gwinn v. *Commissioner*, 54 F. (2d) 728, affirmed, 287 U.S. 224	5
Hernandez v. *Becker*, 54 F. (2d) 542	5
Kaufman v. *Reinecke*, N.D. Ill., decided January 19, 1933	6
Knox v. *McElligott*, 258 U.S. 546	4
Lang v. *Commissioner*, No. 595, Oct. Term, 1932, decided Apr. 10, 1933	3
Lynch v. *Congdon*, 1 F. (2d) 133	5
Shwab v. *Doyle*, 258 U.S. 529	5
Third Nat. Bank & Trust Co. v. *White*, 45 F. (2d) 911, affirmed *per curiam*, 58 F. (2d) 1085, affirmed *per curiam*, 287 U.S. 577	4
Tyler v. *United States*, 281 U.S. 497	3, 4, 5
Walker v. *Grogan*, 283 Fed. 530, affirmed *per curiam*, 300 Fed. 1004	5
Whitehead v. *Commissioner*, C.C.A. 8th, decided March 20, 1933	5
Statute:	
Revenue Act of 1921, c. 136, Sec. 402, 42 Stat. 227, 278	7–8
Miscellaneous:	
Regulations 63:	
Art. 23	8
Art. 24	8
T.D. 3951, VI-1 C.B. 314	9
T.D. 4293, IX-2 C.B. 425	10

174548—33

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 912

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND Laird Bell, Executors of the Estate of William H. Redington, Deceased, petitioners

v.

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 15–19) is reported in 23 B.T.A. 635. The opinion of the Circuit Court of Appeals (R. 31–37) is reported in 62 F. (2d) 591.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 26, 1932 (R. 38). A petition for rehearing was denied January 28, 1933 (R.

38–39). The petition for a writ of certiorari was filed April 26, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there should be included in the gross estate of a decedent dying after the effective date of Section 402 (d) of the Revenue Act of 1921 one-half the value of property acquired by the decedent and his wife as joint tenants prior to September 8, 1916, the effective date of the first Federal estate tax statute.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra,* pp. 7–10.

STATEMENT

The facts were stipulated and were found by the Board of Tax Appeals as follows:

William H. Redington died a resident of Evanston, Illinois, on October 8, 1923, and was survived by his wife, Frances A. Redington (R. 15).

On or about October 5, 1909, the decedent conveyed, through an intermediary, to himself and his wife, as joint tenants and not as tenants in common, certain real estate situated in Evanston, Illinois, and used by them as a homestead. Under the laws of Illinois title to the property vested, upon delivery of the deed, in the decedent and his wife as joint tenants with the right of survivorship. Frances A.

Redington made no contribution at any time to the cost of the real estate. (R. 15.)

The Commissioner included the entire value of the real estate in the decedent's gross estate as subject to tax (R. 13–14). The Board of Tax Appeals determined that only one-half the value of the property was taxable (R. 19), and both parties sought review. The Commissioner's appeal was subsequently dismissed on his motion (R. 35). On the taxpayer's appeal, the court below affirmed the decision of the Board of Tax Appeals (R. 35–37).

ARGUMENT

The estate taxing statute imposes a tax at death and can only attach where there is a taxable event at that time. That event need not be an actual transfer of the property. It is sufficient if the fact of death brings into being or enlarges property rights for the survivor so as to make appropriate the imposition of the tax. This principle is established by this Court's decision in *Tyler* v. *United States*, 281 U.S. 497, where the full value of propery held by the decedent as a tenant by the entirety was held subject to the estate tax under the Revenue Acts of 1916 and 1921.

In the *Tyler case*, the several estates involved had all been created after the enactment of the statutes under which it was sought to impose the tax. But the decision was based on the ground that there was a taxable event at death. See *Lang* v. *Commissioner*, No. 595, October Term, 1932, de-

cided April 10, 1933. Consequently the date of creation of the estate was immaterial. This view of the *Tyler case* found confirmation in the later decision of *Third National Bank & Trust Co.* v. *White,* 287 U.S. 577, where the full value of an estate by the entirety was held taxable although the tenancy was created, as here, before the first estate tax statute. The petitioner does not suggest that tenancies by the entirety and joint tenancies are to be differently treated in this respect. In the case of *Commissioner* v. *Emery,* 62 F. (2d) 591, decided with the present case, the court below clearly indicated that in its opinion there was no basis of distinction between the two types of tenancy. The statutes and decisions support this view.

If, as this Court has held, there is a taxable event at death, it is not significant that the Revenue Act of 1921 contains no language which is specifically retroactive. The Revenue Act imposes a tax, and the conditions which call for the imposition of the tax are met by the death of the decedent after the effective date of the statute.

The various expressions of this and other courts invoked by the petitioners do not seem conclusive here. In *Knox* v. *McElligott,* 258 U.S. 546, the Commissioner sought to include the full value of property jointly owned. The taxpayer had conceded that one-half of the value of the property was taxable, and this Court held that no amount in excess of half could properly be included. Since only one-half of the value of the property has been taxed here, the decision in *Knox* v. *Mc-*

Elligott is not in point. *Shwab* v. *Doyle,* 258 U.S. 529, related to a transfer which was sought to be included in the gross estate under a provision of the Revenue Act of 1916 imposing a tax upon property transferred in contemplation of death. This Court decided that the statute should not be applied to transactions completed before the Act became a law. Under the circumstances of that case there was no taxable event at death.

Walker v. *Grogan,* 283 Fed. 530 (E.D. Mich.), affirmed *per curiam,* 300 Fed. 1004 (C.C.A. 6th), *Lynch* v. *Congdon,* 1 F. (2d) 133 (C.C.A. 8th), and *Carter* v. *English,* 15 F. (2d) 6 (C.C.A. 9th), were decided long prior to the decision of this Court in *Tyler* v. *United States, supra. Walker* v. *Grogan* held that but one-half of the value of jointly owned property was taxable and is therefore not inconsistent with our present position. *Lynch* v. *Congdon* was in effect overruled by the same court in *Whitehead* v. *Commissioner,* decided March 20, 1933, not yet reported. The *Whitehead* decision is direct authority in support of our position. *Carter* v. *English* was definitely repudiated by the court which decided it in *Gwinn* v. *Commissioner,* 54 F. (2d) 728 (C.C.A. 9th), affirmed by this Court, 287 U.S. 224. In *Hernandez* v. *Becker,* 54 F. (2d) 542 (C.C.A. 10th), the court decided that a community estate was neither a joint tenancy nor a tenancy by the entirety. The force of the opinion is to some extent weakened by the court's reliance upon the doubtful authority of *Carter* v. *English* and *Lynch* v. *Congdon,* both *supra,* together with

Estate of Gurnsey, 177 Cal. 211, disapproved by this Court in *Gwinn* v. *Commissioner, supra,* pp. 226–227. The only decision among the later cases which we find inconsistent with the judgment below is that of the District Court for the Northern District of Illinois in *Kaufman* v. *Reinecke,* decided January 19, 1933, not yet officially reported. This case was apparently decided without knowledge of the present decision, which should have controlled the District Court.

CONCLUSION

The decision of the court below appears to be correct. There seems to be no conflict of decisions requiring review. The question is one which does not arise under the Revenue Acts subsequent to that of 1921 and the controlling principles have been settled by this Court. The petition for certiorari should be denied.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
WM. CUTLER THOMPSON,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

MAY 1933.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227, 278:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * *

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so ac-

quired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof;

* * * * *

Treasury Regulations 63, promulgated under the Revenue Act of 1921:

ART. 23. *Property held jointly or as tenants by the entirety.*—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons, and of estates by the entirety. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

ART. 24. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of

funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

T.D. 3951, VI-1 Cumulative Bulletin 314:

Article 27 of Regulations No. 37 (revised January, 1921), and article 23, Regulations No. 63, are hereby amended to read as follows:

Property held jointly or as tenants by the entirety.—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons and of estates by the entirety. This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purpose of administration. It does not include interests held as tenants in common where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all

securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

These amendments apply only to the estates of decedents who died prior to the effective date of the Revenue Act of 1924.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved December 29, 1926.

A. W. MELLON,
Secretary of the Treasury.

T.D. 4293, IX-2 Cumulative Bulletin 425:

Article 27 of Regulations 37 (revised January, 1921), and article 23, Regulations 63, as amended by Treasury Decision 3951, are hereby amended by striking out the following sentence:

"This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death."

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved July 3, 1930.

A. W. MELLON,
Secretary of the Treasury.

U. S. GOVERNMENT PRINTING OFFICE: 1930

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	3
Argument	5
Conclusion	13
Appendix (Statutes and regulations involved)	14–18

CITATIONS

Cases:

Barr v. *Barr*, 273 Ill. 621	6
Grandin v. *Heiner*, 44 F. (2d) 141, 56 F. (2d) 1082, certiorari denied, 286 U.S. 561	13
Gwinn v. *Commissioner*, 287 U.S. 224	5, 6, 12
Hardin v. *Wolf*, 318 Ill. 48	6
Heiner v. *Donnan*, 285 U.S. 312	12
Jordan v. *Roche*, 228 U.S. 436	10
Knox v. *McElligott*, 258 U.S. 546	4, 7, 8, 9
Lang v. *Commissioner*, 289 U.S. 109	11
Lawler v. *Byrne*, 252 Ill. 194	6
Phillips v. *Dime Trust Co.*, 284 U.S. 160	11
Safe Deposit & Trust Co. v. *Tait*, 3 F. Supp. 51	13
Shwab v. *Doyle*, 258 U.S. 529	9
Szymczak v. *Szymczak*, 306 Ill. 541	6
Third National Bank v. *White*, 287 U.S. 577	5, 10, 11
Tyler v. *United States*, 281 U.S. 497	4, 11
Whitehead v. *Commissioner*, 64 F. (2d) 118, No. 172, Oct. Term, 1933	13

Statutes:

Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 402	14
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 302 (U.S.C., Title 26, Sec. 1094.)	15

Miscellaneous:

Regulations 63:	
Art. 23	15
Art. 24	16
T.D. 3951, VI-1 Cumulative Bulletin 314	16
T.D. 4293, IX-2 Cumulative Bulletin 425	18

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 38

HAROLD T. GRISWOLD, W. W. S. CARPENTER AND Laird Bell, Executors of the Estate of William H. Redington, Deceased, petitioners

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 15–19) is reported in 23 B.T.A. 635. The opinion of the Circuit Court of Appeals (R. 31–37) is reported in 62 F. (2d) 591.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered November 26, 1932. (R. 38.) A petition for rehearing was denied January 28, 1933.

(R. 38–39.) The petition for a writ of certiorari was filed April 26, 1933, and was granted May 29, 1933. (R. 43.) The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether there should be included in the gross estate of a decedent dying after the effective date of Section 402 (d) of the Revenue Act of 1921 one half the value of property acquired by the decedent and his wife as joint tenants prior to September 8, 1916, the effective date of the first Federal estate tax statute.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in the Appendix, *infra,* pp. 14–18.

STATEMENT

The facts as stipulated (R. 13–14) and found by the Board of Tax Appeals (R. 15) may be summarized as follows:

William H. Redington died a resident of Evanston, Illinois, on October 8, 1923, and was survived by his wife, Frances A. Redington. (R. 15.)

On or about October 5, 1909, the decedent conveyed, through an intermediary, to himself and his wife, as joint tenants, certain real estate situated in Evanston, Illinois, and used by them as a homestead. Under the laws of Illinois, title to the property vested, upon delivery of the deed, in the decedent and his wife as joint tenants with the

right of survivorship. Frances A. Redington made no contribution at any time to the cost of the real estate. (R. 15.)

The Commissioner included the entire value of the real estate in the decedent's gross estate as subject to tax. (R. 13–14.) The Board of Tax Appeals determined that only one half the value of the property was taxable (R. 19), and both parties sought review. The Commissioner's appeal was subsequently dismissed on his motion. (R. 35.) On the taxpayers' appeal, the court below affirmed the decision of the Board of Tax Appeals. (R. 35–37.)

SUMMARY OF ARGUMENT

Section 402 (d) of the Revenue Act of 1921 (p. 14, *infra*) provides that there shall be included in the gross estate of a decedent the value of all property held by him jointly with any other person. The sole question presented in this case is whether this provision should be construed to require the inclusion in the decedent's gross estate of at least one half the value of property held by him in a joint tenancy created in 1909. No constitutional question is involved.

The words of the statute plainly apply to property held jointly, and there is no qualification as to the date of the creation of the tenancy. The Commissioner is seeking in this case to tax only the half of the property representing the decedent's interest. The decedent had unqualified control over that half at all times and until his death.

Since this control existed when the statute was passed, taxation involves no retroactive application of the statute so far as this half is concerned.

The decision in *Knox* v. *McElligott*, 258 U.S. 546, is not controlling here. There, the taxpayer voluntarily paid the tax upon one half of the value of the joint tenancy involved. The decision was that the tax later collected on the remaining half of the property was not justified by the statute. In the present case it is the tax on the first half of the value of the property—the decedent's interest—which is involved. That portion of the tax was conceded by the taxpayer in *Knox* v. *McElligott* and was not in any way in issue before this Court. There is nothing in the decision in that case to indicate that the implied qualification that the statute should not be retroactively applied should extend to that portion of the tax which involves no retroactivity.

The inclusion in Section 302 of the Revenue Act of 1924 of an express provision that all joint tenancies should be taxed whether created before or after the enactment of the statute does not support the petitioner's construction of the Revenue Act of 1921. The change in the statute was made in order to remove any question of construction in the future and to impose the tax on the entire value of property held in joint tenancy regardless of the date of creation of the estate.

An additional argument in support of our position is found in *Tyler* v. *United States*, 281 U.S.

497, and the many cases which have followed it. In these cases the constitutionality of the statute depended upon the fact that the tax was imposed prospectively and that there was a taxable event at death. There is, therefore, no basis for subjecting the statute to the implied qualification that it shall not have retroactive operation.

ARGUMENT

Section 402 (d) of the Revenue Act of 1921 (*infra*, p. 14) provides that there shall be included in the gross estate of a decedent the value of all property—

> To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, * * *.

The decedent died October 8, 1923, while this statute was in effect. At the time of his death he and his wife were joint tenants of certain real estate in Illinois. This joint tenancy had been created in 1909.

The sole question presented is whether this language of Section 402 (d) should be construed to require the inclusion in the decedent's gross estate of at least one half the value of the property held in joint tenancy. No constitutional question is involved. If the statute be construed to impose the tax in question, its constitutionality is settled by *Gwinn* v. *Commissioner*, 287 U.S. 224, and *Third National Bank* v. *White*, 287 U.S. 577.

From the time of the creation of the joint estate and until the decedent's death after the enactment of the Revenue Act of 1921, the decedent had unqualified control over his half of the joint tenancy. At all times during this period he had a legal right of severance and could have conveyed or mortgaged his share as he saw fit. *Lawler* v. *Byrne,* 252 Ill. 194; *Szymczak* v. *Szymczak,* 306 Ill. 541; *Hardin* v. *Wolf,* 318 Ill. 48. He could have brought suit for partition at any time, and while the tenancy lasted he was entitled to half the rents and profits. *Barr* v. *Barr,* 273 Ill. 621. The creation of the joint tenancy thus did not constitute a completed transfer of the entire property to the wife, nor in any way put the decedent's share beyond his exclusive control while he lived. *Gwinn* v. *Commissioner,* 287 U.S. 224. The words of the statute plainly apply to property held jointly, and there is no qualification as to the date of the creation of the tenancy. The Commissioner is seeking in this case to tax only the half of the property representing the decedent's interest. That half passed from the unqualified control of the decedent at his death and because of his death. Since the decedent's control over his half of the property existed when the statute was passed and continued until his death, taxation involves no retroactive application of the statute so far as this half is concerned. There is, therefore, no occasion to qualify the plain meaning of the words used by Congress by any rule of con-

struction. We submit, therefore, that the statute requires the imposition of the tax in question.

The petitioners' contention that the statute should not be construed to impose any tax in this case is based solely on this Court's decision in *Knox* v. *McElligott*, 258 U.S. 546. But that case plainly is not controlling here. The taxpayer there voluntarily paid the tax upon one-half of the value of the joint tenancy involved. The Collector of Internal Revenue assessed and collected a tax upon the second half, and the suit was brought to recover the tax paid on this second half. A judgment in the taxpayer's favor upon the pleadings was upheld by this Court. In the present case it is the tax on the first half of the value of the property—the decedent's interest—which is involved. That portion of the tax was conceded by the taxpayer in *Knox* v. *McElligott*, and was not in any way in issue before this Court. The Government does not contend, as the petitioners assert (Br. 2), that *Knox* v. *McElligott* has been overruled. The Government has followed that case by conceding the second half of the tax here—the tax on the survivor's interest. Our position is not an attack on *Knox* v. *McElligott*. We contend rather that that case should not be extended to cover facts which were not before the Court.[1]

[1] The argument that *Knox* v. *McElligott* does not prevent the taxation of the decedent's interest in the joint tenancy is forcefully presented in the opinion of the Board of Tax Appeals in this case. (R. 17–19.)

Not only do the facts in *Knox* v. *McElligott* make it clear that only the tax on the survivor's interest was involved, but this Court's reasoning is applicable only to that half. In referring to the decision of the District Court, which was upheld here, this Court said (pp. 548–549):

> And the court added "At the time the statute was passed Cornelia Kissam's [the survivor's] interest belonged to her." The court further observed, "From the structure of the Act, to say that the measure of the tax is the extent of the interest of both joint tenants is, in effect, to say that a tax will be laid on the interest of Cornelia in respect of which Jonas had in his lifetime no longer either title or control." The court rejected that conclusion and denied to the acts of Congress retroactive operation. * * *

It is thus plain that this Court's opinion was intended to apply only to the tax on the half of the value of the property represented by the survivor's interest in it. Since the Commissioner makes no claim that a tax on that half is due in this case, *Knox* v. *McElligott* has no application here. This Court did not hold that the statute was not to be construed to apply to joint tenancies created before 1916. Its holding was that to apply the law to the survivor's half of a joint tenancy created before 1916 would give the statute retroactive operation and that the statute should not be construed to have such an application. But there is nothing in the decision to indicate that the implied quali-

fication that the statute should not be retroactively applied should extend to that portion of the tax which involves no retroactivity.

In reaching its conclusion in *Knox* v. *McElligott*, this Court relied on *Shwab* v. *Doyle*, 258 U.S. 529, decided the same day. That case involved the tax on a transfer in contemplation of death made prior to the enactment of the Revenue Act of 1916. There the taxable event was the transfer, not death. Death was simply the occasion which justified the imposition of the tax. This Court concluded (pp. 536–537) that the statute "should not be construed to apply to transactions completed when the act became a law." In the present case the transaction was not completed by the creation of the tenancy, so far as the decedent's interest was concerned. That interest remained wholly subject to his control until his death, and the imposition of a tax on its transfer at his death involves no retroactive application of a statute "to transactions completed when the act became a law." The creation of the tenancy did put the survivor's half beyond the decedent's control. The reasoning of *Knox* v. *McElligott* and *Shwab* v. *Doyle* is, therefore, applicable to a tax on that half, and, accordingly, no effort is made to collect such a tax here.

In the petition for certiorari (p. 8), the petitioners suggest that their construction of the statute is supported by the fact that in Section 302 of the Revenue Act of 1924 (*infra*, p. 15) an express pro-

vision was included to the effect that the tax on joint tenancies and tenancies by the entirety should apply to all tenancies whether created before or after the enactment of the statute. It is urged that the construction placed upon the Revenue Act of 1921 by the court below in effect makes meaningless the retroactive provisions embodied in the later statutes. There are at least two answers to this argument: (1) In making the change in the language of the 1924 Act, Congress had no intention to construe the 1921 Act so far as its applicability to the decedent's interest in jointly owned property was concerned, but sought rather to remove any question of construction in the future. As this Court said in *Jordan* v. *Roche,* 228 U.S. 436, 446, with respect to a similar change in statute—

> The law was not the declaration of a new policy but a more explicit expression of the purpose of the prior law, made necessary by the judicial construction of that law.

(2) The change in the 1924 Act had a very definite purpose in that it imposed the tax on the *entire* value of property held by the decedent as a joint tenant, although the tenancy was created before the first Federal estate tax Act was passed. This is illustrated by the decision in *Third National Bank* v. *White,* 287 U.S. 577, where a tax on the entire value of property held by the entirety was sustained under the Revenue Act of 1924, although the tenancy was created before 1916.

The foregoing argument is sufficient, we contend, to show that as to the decedent's half interest in the property in question the statute has no retroactive application, and there is, therefore, no occasion for construing it not to apply when its words make it applicable to all property held in joint tenancy. An additional (but not essential) argument in support of our position is found in *Tyler* v. *United States,* 281 U.S. 497, and the many cases which have followed it. It is, of course true, as the petitioners assert (Br. 3), that the question in that case was one of constitutionality rather than of construction. But this Court's decision was based on the ground that the event on which the statute imposes the tax is the death of the decedent, not the creation of the estate. It is the fact of death which brings into being or enlarges the property rights of the survivor, and this is the incident which Congress has made the occasion for the tax. *Lang* v. *Commissioner,* 289 U.S. 109, 112–113. This event takes place after the passage of the taxing statute, regardless of when the tenancy was created. This conclusion is emphasized by this Court's decisions in *Phillips* v. *Dime Trust Co.,* 284 U.S. 160, where the statute was held constitutional when applied to tenancies by the entirety created before the passage of the applicable Act, and in *Third National Bank* v. *White,* 287 U.S. 577, where the statute was held constitutional when applied to a tenancy by the entirety created before the enact-

ment of the Revenue Act of 1916. In each case the constitutionality of the statute depended upon the fact that there was a taxable event at death and that the tax was consequently imposed prospectively.[2]

In the present case the result of the death of the decedent was not simply the coming into possession by the wife of an interest which was already owned irrevocably. Until the death of the husband the wife's interest in the property was limited by equivalent interests of the husband and by his power to sever, with the consequent destruction of her survivorship. Thus it is clear that death in the present case was not merely the occasion for the coming into possession of an already vested remainder, but was the generating source of new rights and was consequently the proper subject of an estate tax which was prospective in operation regardless of the time when the tenancy was created. *Gwinn* v. *Commissioner,* 287 U.S. 224, 228. There is, therefore, no basis for subjecting the statute to the implied qualification that it shall not have retroactive operation.

The decision of the court below that Section 402 (d) of the Revenue Act of 1921 should be construed to tax the decedent's interest in jointly

[2] This is emphasized by *Heiner* v. *Donnan*, 285 U.S. 312, where the transfer was made after the enactment of the applicable Act but was not one which was effective at death and was not testamentary in effect.

owned property is in accord with the conclusion of the Circuit Court of Appeals for the Eighth Circuit in *Whitehead* v. *Commissioner,* 64 F. (2d) 118, now pending on petition for certiorari, No. 172, October Term, 1933. Cf. *Safe Deposit & Trust Co.* v. *Tait,* 3 F. Supp. 51, 59–61 (D. Md.). See also *Grandin* v. *Heiner,* 44 F. (2d) 141 (C.C.A. 3d), affirmed on second appeal, 56 F. (2d) 1082 (C.C.A. 3d), certiorari denied, 286 U.S. 561, holding that the tax on the proceeds of insurance policies under the Revenue Act of 1918 is applicable to policies taken out before 1916 where the insured reserved the right to change the beneficiary.

CONCLUSION

The judgment of the Circuit Court of Appeals is correct and should be affirmed.

Respectfully submitted.

J. CRAWFORD BIGGS,
Solicitor General.
ERWIN N. GRISWOLD,
SEWALL KEY,
WM. CUTLER THOMPSON,
Special Assistants to the Attorney General.

OCTOBER 1933.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Revenue Act of 1921, c. 136, 42 Stat. 227:

SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than a fair consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than a fair consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy in the entirety by the decedent and spouse, or where so acquired by the decedent and any other

person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of one-half of the value thereof; * * *.

Revenue Act of 1924, c. 234, 43 Stat. 253:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(d) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for a fair consideration in money or money's worth;

* * * * *

(h) Subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act. (U.S.C., Title 26, Sec. 1094.)

Treasury Regulations 63, promulgated under the Revenue Act of 1921:

ART. 23. *Property held jointly or as tenants by the entirety.*—The statute provides for the inclusion in the gross estate of inter-

ests held jointly by the decedent and any other person or persons, and of estates by the entirety. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purposes of administration. It does not include interests held as tenants in common, where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

ART. 24. *Taxable portion.*—The entire value of such property is prima facie a part of the decedent's gross estate, but as it is not the intent of the statute that there should be so included a greater part or proportion thereof than is represented by an outlay of funds, which, in the first instance, were decedent's own, or more than a fractional part equal to that of the other joint owner where neither had parted with any consideration in its acquirement, facts, which in a given case bring it within any one of the exceptions enumerated in the statute, may be submitted by the executor.

T. D. 3951, VI-1 Cumulative Bulletin 314:

Article 27 of Regulations No. 37 (revised January, 1921), and article 23, Regulations

No. 63, are hereby amended to read as follows:

Property held jointly or as tenants by the entirety.—The statute provides for the inclusion in the gross estate of interests held jointly by the decedent and any other person or persons and of estates by the entirety. This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death. This class of property includes all interests, whether in real or personal property, where the survivor takes the entire property by right of survivorship, and consequently the decedent's interest therein forms no part of his estate for purpose of administration. It does not include interests held as tenants in common where the interest of each tenant passes free from any right of survivorship.

The following are examples of this class: Real estate held by joint tenants; real estate held by husband and wife (known as an estate by the entirety); money deposited in a bank or trust company in the joint names of the decedent and another and payable to either or the survivor; and, in general, all securities and other personal property, where the title thereto was vested in the decedent and one or more other persons, subject to the right of survivorship.

These amendments apply only to the estates of decedents who died prior to the effective date of the Revenue Act of 1924.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved December 29, 1926.

A. W. MELLON,
Secretary of the Treasury.

T. D. 4293, IX-2 Cumulative Bulletin 425:

Article 27 of Regulations 37 (revised January, 1921), and article 23, Regulations 63, as amended by Treasury Decision 3951, are hereby amended by striking out the following sentence:

This provision applies only to a joint tenancy, or a tenancy by the entirety, created subsequent to the passage of the Revenue Act in force and effect at the time of the decedent's death.

ROBT. H. LUCAS,
Commissioner of Internal Revenue.

Approved, July 3, 1930.

A. W. MELLON,
Secretary of the Treasury.

U. S. GOVERNMENT PRINTING OFFICE: 1933

FILE COPY

FILED
DEC 1 193
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 38

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND LAIRD BELL, EXECUTORS OF THE ESTATE OF WILLIAM H. REDINGTON, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

WM. N. HADDAD,
Counsel for Petitioners.

THE GUNTHORP-WARREN PRINTING COMPANY, 830 WEST JACKSON, CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

No. 38

HAROLD T. GRISWOLD, W. W. S. CARPENTER, AND LAIRD BELL, EXECUTORS OF THE ESTATE OF WILLIAM H. REDINGTON, DECEASED,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR REHEARING.

During the oral argument in this case, counsel for the petitioners was asked if the statute was not construed as it was in *Knox* v. *McElligott*, 258 U. S. 546, in order to avoid the constitutional doubts which would have arisen on a contrary construction; and further, if these doubts have not been largely removed by subsequent cases. Counsel answered yes to both questions. Counsel's answer to the second question was not accurate—at least, it should have been amplified. Because we believe that the decision in this case overrules the reasoning in *Knox* v. *McElligott*, and because we feel that this result may have been reached on the assumption (based on counsel's improvident admission) that the constitutional

doubt which was present in the *Knox* case no longer exists, we are filing this petition for rehearing.

We submit that if a different construction had been adopted in *Knox* v. *McElligott*, the statute would have been unconstitutional. The statute provides for the inclusion in the gross estate of property "to the extent of the interest therein held jointly — — by the decedent and any other person." The "interest held jointly" consists of the decedent's half and the survivor's half. It must be conceded that a tax on the decedent's half would be constitutional whether the property was placed in joint tenancy before or after the passage of the act. In a practical sense, this half passes to the survivor at the date of the decedent's death, so a tax on its transfer cannot be said to be retroactive. (The tax in the present case, therefore, is not retroactive, and cannot be attacked on constitutional grounds.) But it is equally clear that a tax on the survivor's half of property held in joint tenancy since before 1916, would be unconstitutional, because it would be retroactive within the meaning of *Nichols* v. *Coolidge*, 274 U. S. 531, and *Untermyer* v. *Anderson*, 276 U. S. 440.

This view is not inconsistent with *Gwinn* v. *Commissioner*, 287 U. S. 224, because the *Gwinn* case involved a tax on only one-half (the decedent's half) of the property. Nor is it inconsistent with *Third National Bank* v. *White*, 287 U. S. 577. That case had to do with a tenancy by the entirety which, for this purpose, is essentially different from a joint tenancy. A tenant by the entirety has nothing which he can really regard as his own as long as his cotenant is living. In a certain sense he owns a half interest in the property; but he cannot sell or mortgage this interest, or give it away, or sever it, without the concurrence of the other tenant. His

rights "are hedged about at all points" by the equal rights of the cotenant (*Tyler* v. *United States*, 281 U. S. 497). The death of one tenant by the entirety, therefore, results in "important and definite accessions" to the rights of the other, not only with respect to the decedent's half, but with respect to the entire property.

This is not true of a joint tenancy. In the case of a joint estate, each tenant has complete control of his share. He can sell this share, or mortgage it, or give it away, without his cotenant's consent. *Lawler* v. *Byrne*, 252 Ill. 194; *Szymczak* v. *Szymczak*, 306 Ill. 541; *Hardin* v. *Wolf*, 318 Ill. 48; *Liese* v. *Hentze*, 326 Ill. 633. And he can sever the tenancy at any time by partition proceedings. *Barr* v. *Barr*, 273 Ill. 621. Except for the shadowy distinction between a general power and a limitation in fee (See *Bullen* v. *Wisconsin*, 240 U. S. 625), each joint tenant is the absolute owner of his half of the property from the moment that the estate is created. With respect to this half, the death of the cotenant does not transfer to the survivor any substantial rights which he did not have before, and such death, therefore, cannot be made the occasion for an excise tax (on the surviving tenant's half).

The incidents of a tenancy by the entirety are such that each tenant in effect has a life interest in one-half of the property and a contingent remainder in the whole—*i. e.*, contingent on his surviving the other tenant. The death of the other tenant ripens this contingency into actual ownership. It gives the surviving tenant the usual rights and powers of an owner, which rights and powers he did not previously enjoy with respect to any portion of the property.

On the other hand, in the case of a joint tenancy, each tenant in substance has a life estate and a *vested* remain-

der in one-half of the property (subject to be divested by his dying before his cotenant and before the estate is severed), and a contingent remainder in the other half (subject to a converse contingency). The death of one tenant converts the contingent remainder into a present estate and terminates the decedent's power to destroy that remainder by a severance. In a word, it transfers the decedent's half of the property to the survivor. This half can be made the subject of a transfer tax. But the death has no such effect on the other half. As to that half, the only effect that the death has is to convert a vested remainder into an estate in possession. This conversion cannot be made the subject of a succession tax. *Coolidge* v. *Long,* 282 U. S. 582. It is true that the death of one joint tenant relieves the interest of the survivor from the divesting contingency. But this contingency is not substantial because the survivor himself could have removed it at any time by severing the estate (through a sale, mortgage, gift, partition proceedings, etc.).

We therefore believe that if *Knox* v. *McElligott* were to come up to-day it would have to be decided the same way, whether on the ground that the statute is inapplicable or that it is unconstitutional. The Board of Tax Appeals has just decided a case (*Goodenough* v. *Commissioner,* Docket No. 32059, October 31, 1933) holding that in view of *Knox* v. *McElligott,* no part of property owned by the decedent and his wife as tenants by the entirety since 1915 is taxable under the Revenue Act of 1921. If that case or any similar case ever reaches this court, this court will have to decide what effect the present decision has had on *Knox* v. *McElligott.* If *Knox* v. *McElligott* is wrong and is to be regarded as having been overruled, then the statute, in so far as it applied to the interest involved in the *Knox* case was unconstitutional.

If both *Knox* v. *McElligott* and the decision in the present case are to stand, then the statute must be regarded as applying to one-half and only one-half of property held in joint estates created prior to 1916. But the language of the statute will not admit of such a construction. Section 402 (d) of the Revenue Act of 1921 provides for the inclusion of the "interest held jointly" (not a half or any other fraction of that interest). It contains special provisions for the exclusion of a portion of the property in exceptional cases: it excludes the portion of the property which is shown to have originally belonged to the surviving tenant; it provides that where property is acquired by gift or bequest and the interests of the tenants are not specified or fixed by law, only one-half of the property should be included. This enumeration of specific cases where only a portion of the property is to be taxed shows an unmistakable intention to include the entire property in all other cases. It follows that if the statute applies to one-half of the property, as held in the present case, it applies to the other half as well. And if, as decided in *Knox* v. *McElligott*, the statute does not cover the entire value of property held in a previously created joint tenancy, the statute does not cover any portion of that property.

There is but one way of reconciling the decision in the present case with the decision in *Knox* v. *McElligott*, and that is to say that the result reached in *Knox* v. *McElligott* was correct because the statute, though applicable to the interest involved in that case, was, as so applied, unconstitutional. In other words, the court in the present case may be overruling the reasoning in *Knox* v. *McElligott* and may be justifying the decision in the *Knox* case solely on constitutional grounds. If that is so, then it seems to us that contrary to the settled practice of this

court, it is, in effect, deciding a constitutional question which does not arise in the case now before it and which can very easily be avoided by adhering to a construction which it adopted in an earlier decision and which for years has been accepted as the correct construction.

We respectfully submit that there is no occasion to overrule either the reasoning or the decision in *Knox* v. *McElligott* and no occasion to distinguish that case in a way which puts an artificial construction on the statute—a construction which, we believe, does violence to the language used, and makes the statute mean one thing when applied to estates created before its passage and another thing when applied to estates created afterwards. Such an anomalous result can easily be avoided by affirming the reasoning in *Knox* v. *McElligott* and applying it to the present case.

Respectfully submitted,

WM. N. HADDAD,
Counsel for Petitioners.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

WM. N. HADDAD,

SUPREME COURT OF THE UNITED STATES.

No. 38.—October Term, 1933.

Harold T. Griswold, W. W. S. Carpenter, and Laird Bell, Executors of the Estate of William H. Redington, Deceased, Petitioners, *vs.* Guy T. Helvering, Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[November 6, 1933.]

Mr. Justice Sutherland delivered the opinion of the Court.

Section 402 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 277, 278, imposing an inheritance tax, provides,

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property,

"(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, . . ."

The decedent died in 1923, while the foregoing provision was in effect. At the time of his death he and his wife held as joint tenants certain real estate in Illinois, title to which vested in them by conveyance on October 5, 1909. The commissioner valued this real estate at $90,000, and included the whole of it in the value of decedent's gross estate as being within the reach of § 402 (d). Upon appeal to the Board of Tax Appeals, that tribunal, disapproving in part the commissioner's determination, held that the value of only decedent's one-half of the property could be included for the purposes of the tax. 23 B. T. A. 635. The circuit court of appeals affirmed. 62 F. (2d) 591.

Whether this application of the statute gives it retroactive effect is the sole question here involved; and with that we find no difficulty. Under the statute the death of decedent is the event in respect of which the tax is laid. It is the existence of the

joint tenancy at that time, and not its creation at the earlier date, which furnishes the basis for the tax. By the judgment under review, only half of the value, that is to say, the value of decedent's interest, has been included, leaving the survivor's interest unaffected. After the creation of the joint tenancy, and until his death, decedent retained his interest in, and control over, half of the property. Cessation of that interest and control at death presented the proper occasion for the imposition of a tax. See *Gwinn* v. *Commissioner,* 287 U. S. 224, and cases cited. And since that is all that is sought to be reached by the tax here in question, the complaint that the statute has been given a retroactive application obviously is without substance. The statute as applied does not lay a tax in respect of an event already past, but in respect of one yet to happen.

Petitioners insist that *Knox* v. *McElligott,* 258 U. S. 546, is to the contrary, but, clearly, it is not. There the tax return included the value of decedent's one-half of the jointly owned property, but did not include the value of the half which had been owned and enjoyed by the surviving joint tenant. Nevertheless, the commissioner undertook to impose a tax in respect of the value of this latter half as well. This court held that to do so was to apply the statute retroactively, and that this, under the circumstances of that case, could not be done. It did not hold, or intend to hold, that the statute was retroactive in so far as the value of the decedent's half of the joint estate was concerned. That question was not there involved. It is the only question here.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.